IN THE GENERAL SESSIONS COURT FOR KNOX COUNTY, TENNESSEE
DIVISIONS I, II, III, IV & V

FILED
JUN 06 2008
By MARTHA PHILLIPS, Clerk

IN RE: PETITION OF THE KNOX COUNTY PUBLIC DEFENDER-- SWORN PETITION TO SUSPEND APPOINTMENT OF THE DISTRICT PUBLIC DEFENDER TO DEFENDANTS IN THE KNOX COUNTY GENERAL SESSIONS COURT, MISDEMEANOR DIVISION.

MEMORANDUM OF LAW REGARDING COURT'S AUTHORITY TO GRANT PUBLIC DEFENDER'S REQUESTED RELIEF

This Court has the authority to grant the relief that the Public Defender has requested in his Sworn Petition. Tennessee Supreme Court Rule 13 ("Rule 13"), on which the Public Defender has based his request for relief, sets out the standard for determining the occasions when the Public Defender should not be appointed to represent an indigent defendant. Rule 13 contemplates that, when it is **appropriate** to appoint the Public Defender, the Court will appoint the Public Defender's office rather than the individual lawyer or lawyers in that office who will handle the case. Therefore, the Court has the power to determine, pursuant to Rule 13, that the Public Defender's **office** cannot accept additional appointments because of its caseload.

Moreover, given the number of new clients whom the Public Defender is appointed to represent on a daily basis, it would create a burden on the Court for the individual lawyers in the Public Defender's office to attempt to make the requisite showing under Rule 13 on a case-by-case basis. Indeed, the Court would be able to do little else than determine case-by-case whether the lawyer has made that showing.

Furthermore, nothing in Rule 13 or the statutes governing the appointment of the Public Defender requires that the Public Defender be available to accept appointments in all courts. Nevertheless, to the extent that those statutes or any other state law could be construed as requiring that the Public Defender be available in all courts, such law must yield to the standard

set out in Rule 13. In promulgating Rule 13, the Tennessee Supreme Court exercised not only statutory authority but also its inherent power to regulate the practice of law in Tennessee, a power that, under well-established precedents, neither the executive nor the legislative branch of the government may encroach upon or infringe.

I. Rule 13 provides the standard for the Court to apply in determining whether it is appropriate to appoint the Public Defender.

The Public Defender has based his request for relief in the Sworn Petition on Rule 13, Section 1(e), which provides, in relevant part:

> When appointing counsel for an indigent defendant pursuant to Section 1(e)(3), the court shall appoint the district public defender's office, the state post-conviction defender's office, or other attorneys employed by the state for indigent defense (herein "public defender") if qualified pursuant to this rule and no conflict of interest exists, **unless in the sound discretion of the trial judge appointment of other counsel is necessary**. . . .
>
> . . . .
>
> The court **shall not** make an appointment if counsel makes a clear and convincing showing that adding the appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards.

Sup. Ct. R. 13, § 1(e)(4)(A), (D) (emphasis added) (copy attached as **Exhibit A**).

Rule 13 contains both a mandatory and a discretionary aspect. If the Court determines that the Public Defender has shown by clear and convincing evidence that he cannot represent an indigent defendant consistently with constitutional and professional standards,[1] under the rule the Court has no choice but to appoint private counsel. Even if the Court determines that the Public

[1] As the Court is aware, in his Sworn Petition the Public Defender discusses at length the constitutional and professional standards that are implicated by excessive caseloads and workloads. *In re: Petition of Knox County Public Defender* (file date March 26, 2008), at 15–26. The Public Defender incorporates by reference the reasoning and arguments contained in the Sworn Petition.

Defender has not made the requisite showing by clear and convincing evidence, the Court may, in the exercise of its sound discretion, decline to appoint the Public Defender.

II. Under Rule 13, the Court has the power to consider the caseload of the Public Defender's office, rather than that of each individual lawyer in the office, and to determine that the office cannot accept additional appointments.

Rule 13 contemplates that, when appropriate, the Court is to appoint the Public Defender's *office*, rather than an individual lawyer in that office, to represent an indigent defendant. As the rule states, it is "the district public defender's **office**" that is appointed. Sup. Ct. R. 13, § 1(e)(4)(A) (emphasis added) (*see* **Exhibit A**).

The Rule also states that "counsel" must make the requisite showing. As used in the Rule, "counsel" is an inclusive term that stands for either the Public Defender's office or the private attorney appointed to represent the indigent defendant. The term does not only connote an individual lawyer. For example, the Rule provides, "Appointed counsel shall continue to represent an indigent party throughout the proceedings, including any appeals, until the case has been concluded or counsel has been allowed to withdraw by a court." Sup. Ct. Rule 13, § 1(e)(5) (*see* **Exhibit A**). This means that, if appointed to represent a defendant, the Public Defender's **office** must represent that defendant until the proceedings have been concluded, not that an individual lawyer in the office must do so. *See Castro v. United States*, 310 F.3d 900, 902 (6th Cir. 2002) (copy attached as **Exhibit B**) ("When interpreting statutory language, a court should interpret the statute as a coherent whole and give consistent meaning to terms throughout the statute."); *Bd. of Prof'l Responsibility v. Love*, No. M2007-00790-SC-R3-CV, 2008 Tenn. LEXIS 323, *19–20 (Tenn. May 12, 2008) (copy attached as **Exhibit C**) (reaffirming prior holding that

rules promulgated by Tennessee Supreme Court should be interpreted "in the same manner as statutes").

Although Rule 13 uses singular language to describe the showing that the Public Defender must make to demonstrate that he should not be appointed to represent a defendant, the language does not compel the conclusion that the Court must make this determination on a case-by-case basis. In fact, because the Rule provides for the appointment of the office rather than individual lawyers in the office, it is eminently reasonable to conclude that the Rule allows the Court to determine whether the showing has been made with regard to an aggregation of defendants.

Furthermore, the Public Defender is appointed to approximately forty-six (46) new cases on average per day.[2] If the Public Defender were required to apply to the Court for relief under Rule 13 separately for each new appointment, the Court would be able to do little else than decide whether the Public Defender has made the requisite showing. Given the practical impossibility of proceeding in that manner, it is again appropriate for the Court to interpret Rule 13 as allowing the Public Defender to attempt to make the requisite showing as to an aggregation of defendants—in this case, indigent defendants in the Misdemeanor Division.

III. Neither Rule 13 nor the statutes governing representation of indigent defendants require that the Public Defender be available in all courts.

Nothing in the language of Rule 13 requires that the Public Defender be available to accept appointments in all courts. Rule 13 refers to two statutory schemes that also apply to the

[2] Based on appointments for the first three-quarters of fiscal year 2008 (*see* Supplemental Affidavit of Issac Merkle (file date May 27, 2008) (copy attached as **Exhibit D**)), the Public Defender's office, using a simple ratio (X / 8,579 = 12 / 9), projects that it will have been appointed in approximately 11,438 cases for the entire fiscal year 2008. Assuming a standard, 50-work-week year, with each work week containing 5 work days, there are 250 work days in a year. Therefore, the Public Defender's office estimates it will have been appointed in approximately 46 cases per day during fiscal year 2008 (11,438 / 250).

representation of indigent defendants: T.C.A. §§ 40-14-101 *et seq.* (copies of relevant statutes attached as **Exhibit E**) and T.C.A. §§ 8-14-201 *et seq.* (copies of relevant statutes attached as **Exhibit F**). With two possible exceptions, none of the provisions in either statutory scheme require that the Public Defender be available in all courts.

The first potential exception arises out of T.C.A. § 40-14-202(a), which provides that, when an indigent defendant has been charged with a felony, "the court shall appoint to represent the accused either the public defender, if there is one for the county, or, in the absence of a public defender, a competent attorney licensed in the state." It is possible to read this provision as requiring that the Public Defender be appointed to represent an indigent defendant accused of a felony if there is a Public Defender's office in the county in which the case is being prosecuted. Nevertheless, the Court could not appoint the Public Defender's office if it had a conflict under Tennessee Rule of Professional Conduct ("TRPC") 1.7 (copy attached as **Exhibit G**). Furthermore, the phrase, "in the absence of a public defender," can mean that the Public Defender's office is not available to represent the defendant because of a conflict of interest, an excessive caseload, or some other, valid reason. Therefore, T.C.A. § 40-14-202(a) does not require the appointment of the Public Defender.

The second potential exception arises out of the statutes governing representation in cases involving multiple indigent defendants. T.C.A. § 8-14-205(e) provides, in relevant part:

> In any case or proceeding wherein there is more than one (1) indigent person accused, **one (1) such person shall be represented by the district public defender's office, and the court shall appoint an attorney to represent such other indigent persons**. Such other indigent persons may also be represented by the district public defender's office; provided, that the court makes an affirmative finding prior to the appointment that no conflict of interest exists and it appears there is good cause to believe no conflict of interest is likely to arise.

Tenn. Code Ann. § 8-14-205(e) (emphasis added). It is possible to read this section to require that the Court appoint the Public Defender's office to represent at least one of the indigent defendants. Again, however, the Court could not appoint the Public Defender's office if it were conflicted as to all defendants under TRCP 1.7. Further, T.C.A. § 8-14-205(d) provides that, in lieu of appointing the Public Defender's office, the court may appoint private counsel "as provided by law." Such "law" includes not only the Tennessee Rules of Professional Conduct but also Rule 13 of the Tennessee Supreme Court Rules, both of which allow the Court **not** to appoint the Public Defender's office. Therefore, T.C.A. § 8-14-205(e) does not require the appointment of the Public Defender's office.

IV. To the extent that a statute or other state law conflicts with Rule 13, that law must yield to the standard in Rule 13.

To the extent that the statutes discussed above or other sources of state law could be construed as requiring that the Public Defender be available in all courts to accept appointments, such law must yield to the standard set out in Rule 13 for determining when it is not appropriate to appoint the Public Defender. The Tennessee Supreme Court promulgated Rule 13 pursuant to a statutory grant of authority. T.C.A. § 40-14-206 provides that the Supreme Court may promulgate rules to accomplish the purposes of the statutes governing representation for indigent defendants.

It is clear, however, that, in promulgating Rule 13, the Supreme Court also exercised a more deeply seated power, one rooted in the state constitution and its organization of the state government. The Supreme Court has time and again recognized its "inherent supervisory power to regulate the practice of law" in this state. *Doe v. Bd. of Prof'l Responsibility*, 104 S.W.3d 465, 469 (Tenn. 2003) (copy attached as **Exhibit H**); *Brown v. Bd. of Prof'l Responsibility*, 29

S.W.3d 445, 449 (Tenn. 2000) (copy attached as **Exhibit I**); *In re Petition of Burson*, 909 S.W.2d 768, 773–74 (Tenn. 1995) (copy attached as **Exhibit J**); *see Belmont v. Bd. of Law Examiners*, 511 S.W.2d 461, 463–64 (Tenn. 1974) (copy attached as **Exhibit K**).

The *Belmont* case involved a conflict between a Supreme Court rule and a statute, both of which governed the ability of an unsuccessful bar examinee to re-take the bar exam. 511 S.W.2d at 462. Resolving the conflict between the two provisions in favor of its rule, the Supreme Court held:

> The law is clear, therefore, that an act of the legislature in aid of the inherent power of the judiciary is constitutional; but one that conflicts with and supersedes the Court's declared requirements, and constitutes an attempted exercise of powers properly belonging to the judicial branch by the legislative branch of government violates Article II, Section 2 and Article VI, Section 1 of the Constitution of Tennessee.

Id. at 464.

In this case, the authority on which the Public Defender relies, Rule 13, regulates the practice of law in a specific situation—the representation of indigent criminal defendants. Therefore, in promulgating this rule, the Supreme Court exercised not only its authority under section 40-14-206 but also its inherent authority over the practice of law in Tennessee. To the extent that a statute or other state law conflicts with the power Rule 13 gives to a court to decline to appoint the public defender, that law is void.

V. The budgetary concerns of the State cannot supersede the requirements of Rule 13.

Implicit in the May 14, 2008, letter from the Attorney General's office to the Court (copy attached as **Exhibit L**) is that the Court must consider the fiscal impact of suspending appointments of the Public Defender to represent defendants in the Misdemeanor Division. The Public Defender is certainly sensitive to the budgetary crisis that the State is experiencing. The

Public Defender submits, however, that budgetary concerns cannot trump the requirements of Rule 13 and the constitutional and professional standards on which it is based.

In fact, a former Chief Justice of the Tennessee Supreme Court has opined on the interplay between budgetary concerns and the provision of legal representation to indigent defendants. In a series of memoranda issued in 1991, the office of then-Chief Justice Lyle Reid offered guidance to state criminal trial judges in applying T.C.A. § 8-14-205(e), which, as discussed above, governs representation in cases involving multiple indigent defendants. (*see* **Exhibit F**). Justice Reid's office was motivated by "mandated cost reductions in the budget of the state judicial court system." Aug. 7, 1991 Memorandum (copy attached as **Exhibit M**).

Justice Reid's office stated that the public defender should be appointed "whenever possible" and that a court should only appoint private counsel if a conflict of interest requires it. July 12, 1991 Memorandum (copy attached as **Exhibit N**); (*see* **Exhibit M**). Justice Reid's office was concerned that, in the case of multiple indigent defendants, trial courts were "automatically" appointing a private attorney to represent a defendant instead of inquiring whether the public defender could represent some or all defendants consistently with the requirements of § 8-14-205(e) regarding actual or potential conflicts. July 25, 1991 Memorandum (copy attached as **Exhibit O**); (*see* **Exhibits M, N**). Justice Reid's office indicated that a heavy workload alone would not justify the appointment of private counsel in a multiple-defendant case. Nevertheless, his office also stated that, "if the immediate or continuing responsibilities of [the public defender's] office prevent the public defender from rendering effective assistance of counsel or otherwise performing the duties of that office, it can be considered a reason for appointment of private counsel in cases involving multiple defendants." (*see* **Exhibits N, O**).

In a November 20, 1991, letter declining this Court's invitation to participate in proceedings for relief from caseloads initiated by the Public Defender (copy attached as **Exhibit P**), Justice Reid's office stated that, with regard to the appointment of counsel for indigent defendants, "ALL OTHER CONSIDERATIONS MUST BE SUBORDINATED TO THE RIGHT OF AN ACCUSED TO HAVE EFFECTIVE ASSISTANCE OF COUNSEL AS REQUIRED BY LAW." (emphasis in original). Chief Justice Reid's office therefore recognized that the quality of representation to which an indigent defendant is constitutionally entitled must be the Court's paramount concern, even in the face of budget shortfalls.

VI. Although the Public Defender has proposed the suspension of appointments in the Misdemeanor Division of the Court, the Public Defender welcomes the Court's opinions on any other relief that may be appropriate.

The Public Defender has proposed as relief from the office's excessive caseloads and workloads the suspension of appointment of his office to represent defendants in the Misdemeanor Division. The Public Defender has proposed this relief because, as discussed in the Sworn Petition, the Public Defender believes that this solution is the least disruptive and least costly. Furthermore, the Public Defender believes this relief will allow the office to continue to accept appointments to represent those defendants charged with the most serious crimes, consistently with constitutional and professional standards. *In re: Sworn Petition of Knox County Public Defender* (file date March 26, 2008), at 1–4. Nevertheless, the Public Defender has initiated this **collaborative** effort between the Court and his office to address the caseload and workload crises that his office is experiencing. Therefore, the Public Defender welcomes the Court's opinions on what is the best solution to the identified problem.

CONCLUSION

Rule 13 sets out the standard for the Court to apply in determining whether the Public Defender should be appointed to represent an indigent defendant. Because the rule contemplates that the Public Defender's office, rather than the individual lawyers in the office, is appointed, the Court may determine in the aggregate that the Public Defender should not be appointed to represent a group of defendants. Furthermore, nothing in Rule 13 or other state law governing representation of indigent defendants requires that the Public Defender's office be available to accept appointments in all courts. Nevertheless, to the extent that a source of state law could be construed to impose such a requirement, that law must yield to the standard in Rule 13. Because the Tennessee Supreme Court exercised its inherent power to regulate the practice of law in promulgating Rule 13, neither the executive nor the legislative branch may encroach upon or infringe its requirements.

Finally, although the Public Defender has proposed the suspension of appointment of his office in the Misdemeanor Division, the Public Defender welcomes the Court's opinions on any other appropriate relief.

Respectfully submitted,

CHAMBLISS, BAHNER & STOPHEL, P.C.

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14. Co-defendants:
    a. Were there any co-defendants in the trial? Yes ( ) No ( )
    b. If yes, what conviction and sentence were imposed on them?
    c. Nature of co-defendant's role in offense:
    d. Any further comments concerning co-defendants:

15. Other Accomplices:
    a. Were there any persons not tried as co-defendants who the evidence showed participated in the commission of the offense with the defendant? Yes ( ) No ( )
    b. If yes, state the nature of their participation, whether any criminal charges have been filed against such persons as a result of their participation and the disposition of such charges, if known:
    c. Did the accomplice(s) testify at the defendant's trial? Yes ( ) No ( )

D. REPRESENTATION OF THE DEFENDANT

1. How many attorneys represented defendant?
   (If more than one counsel served, answer the following questions as to each counsel and attach a copy for each to this report.)
2. Name of counsel:
3. Date counsel secured:
4. How was counsel secured:
   a. Retained by defendant ( )
   b. Appointed by court ( )
   c. Public defender ( )
5. If counsel was appointed by court, was it because:
   a. Defendant unable to afford counsel ( )
   b. Defendant refused to secure counsel ( )
   c. Other (explain):
6. How many years has counsel practiced law?
   a. 0 to 5 ( )
   b. 5 to 10 ( )
   c. Over 10 ( )
7. What is the nature of counsel's practice?
   a. Mostly civil ( )
   b. General ( )
   c. Mostly criminal ( )
8. Did counsel serve throughout the trial? Yes ( ) No ( )
9. If not, explain in detail:
10. Other significant data about defense representation:

E. GENERAL CONSIDERATIONS

1. What percentage of the population of the county from which the jury was selected is the same race as the defendant?
   a. Under 10% ( )
   b. 10%—25% ( )
   c. 25%—50% ( )
   d. 50%—75% ( )
   e. 75%—90% ( )
   f. Over 90% ( )
2. Were members of defendant's race represented on the jury? Yes ( ) No ( )
3. How many of defendant's race were jurors?
3. a. Was a change of venue requested? Yes ( ) No ( )
   b. If yes, was it granted? Yes ( ) No ( )
   Reasons for change, if granted:

F. CHRONOLOGY OF CASE

		Elapsed Days
1.	Date of offense	
2.	Date of arrest	
3.	Date trial began	
4.	Date sentence imposed	
5.	Date post-trial motions ruled on	
6.	Date trial judge's report completed	
*7.	Dated received by Supreme Court	
*8.	Date sentence review completed	
*9.	Total elapsed days	
10.	Other	

*To be completed by Supreme Court

This report was submitted to the defendant's counsel and to the attorney for the State for such comments as either desired to make concerning its factual accuracy.

		D.A.	Defense Counsel
1.	Comments are attached	( )	( )
2.	Had no comments	( )	( )
3.	Has not responded	( )	( )

I hereby certify that I have completed this report to the best of my ability and that the information herein is accurate and complete.

Date

Judge,
Court of County
Judicial District

[Amended effective January 1, 1988; June 1, 1992; October 28, 1996; October 28, 1997; May 27, 1999; October 27, 2000; March 5, 2003.]

Rule 13. Appointment, Qualifications, and Compensation of Counsel for Indigent Defendants

Section 1. Right to counsel and procedure for appointment of counsel.

(a)(1) The purposes of this rule are:

(A) to provide for the appointment of counsel in all proceedings in which an indigent party has a statutory or constitutional right to appointed counsel;

(B) to provide for compensation of appointed counsel in non-capital cases;

(C) to establish qualifications and provide for compensation of appointed counsel in capital cases, including capital post-conviction proceedings;

(D) to provide for payment of expenses incident to appointed counsel's representation;

(E) to provide for the appointment and compensation of experts, investigators, and other sup-

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port services for indigent parties in criminal cases, parental rights termination proceedings, dependency and neglect proceedings, delinquency proceedings, and capital post-conviction proceedings;

(F) to establish procedures for review of claims for compensation and reimbursement of expenses; and

(G) to meet the standards set forth in Section 107 of the Antiterrorism and Effective Death Penalty Act of 1996.

(2) The failure of any court to follow the provisions of this rule shall not constitute grounds for relief from a judgment of conviction or sentence. The failure of appointed counsel to meet the qualifications set forth in this rule shall not be deemed evidence that counsel did not provide effective assistance of counsel in a particular case.

(b) Each trial court exercising criminal jurisdiction shall maintain a roster of attorneys from which appointments will be made. However, a court may appoint attorneys whose names are not on the roster if necessary to obtain competent counsel according to the provisions of this rule.

(c) All general sessions, juvenile, trial, and appellate courts shall appoint counsel to represent indigent defendants and other parties who have a constitutional or statutory right to representation (herein "indigent party" or "defendant") according to the procedures and standards set forth in this rule.

(d)(1) In the following cases, and in all other cases required by law, the court or appointing authority shall advise any party without counsel of the right to be represented throughout the case by counsel and that counsel will be appointed if the party is indigent and requests appointment of counsel.

(A) Cases in which an adult is charged with a felony or a misdemeanor and is in jeopardy of incarceration;

(B) Contempt of court proceedings in which the defendant is in jeopardy of incarceration;

(C) Proceedings initiated by a petition for *habeas corpus*, early release from incarceration, suspended sentence, or probation revocation;

(D) Proceedings initiated by a petition for post-conviction relief, subject to the provisions of Tennessee Supreme Court Rule 28 and Tennessee Code Annotated sections 40–30–101 et seq.;

(E) Parole revocation proceedings pursuant to the authority of state and/or federal law;

(F) Judicial proceedings under Tennessee Code Annotated, Title 33, Chapters 3 through 8, Mental Health Law;

(G) Cases in which a superintendent of a mental health facility files a petition under the guardianship law, Tennessee Code Annotated, Title 34; and

(H) Cases under Tennessee Code Annotated section 37–10–304 and Tennessee Supreme Court Rule 24, relative to petitions for waiver of parental consent for abortions by minors.

(2) In the following proceedings, and in all other proceedings where required by law, the court or appointing authority shall advise any party without counsel of the right to be represented throughout the case by counsel and that counsel will be appointed if the party is indigent and, except as provided in (C) and (D) below, requests appointment of counsel.

(A) Cases in which a juvenile is charged with juvenile delinquency for committing an act which would be a misdemeanor or a felony if committed by an adult;

(B) Cases under Titles 36 and 37 of the Tennessee Code Annotated involving allegations against parents that could result in finding a child dependent or neglected or in terminating parental rights;

(C) Reports of abuse or neglect or investigation reports under Tennessee Code Annotated sections 37–1–401 through 37–1–411. The court shall appoint a guardian ad litem for every child who is or may be the subject of such report. The appointment of the guardian ad litem shall be made upon the filing of the petition or upon the court's own motion, based upon knowledge or reasonable belief that the child may have been abused or neglected. The child who is or may be the subject of a report or investigation of abuse or neglect shall not be required to request appointment of counsel. A single guardian ad litem shall be appointed to represent an entire sibling group unless the court finds that conflicting interests require the appointment of more than one guardian. For purposes of this subsection, the compensation limits established in section 2 apply to each guardian ad litem appointed rather than to each child.

(D) Proceedings to terminate parental rights. The court shall appoint a guardian ad litem for the child, unless the termination is uncontested. The child who is or may be the subject of proceedings to terminate parental rights shall not be required to request appointment of counsel. A single guardian ad litem shall be appointed to represent an entire sibling group unless the court finds that conflicting interests require the appointment of more than one guardian. For purposes of this subsection, the compensation limits established in section 2 apply to each guardian ad litem appointed rather than to each child.

(E) Cases in which a juvenile is charged upon three (3) or more court proceedings to be unruly

as defined in Tennessee Code Annotated section 37–1–126(a).

e)(1) Except in cases under Sections 1(d)(1)(F) oceedings under the mental health law, 1(d)(1)(G) oceedings for guardianship under Title 34, and l)(2)(A) juvenile delinquency proceedings, whenever party to any case in section 1(d) requests the pointment of counsel, the party shall be required to mplete and submit to the court an Affidavit of digency Form provided by the Administrative Office the Courts, herein "AOC".

(2) Upon inquiry, the court shall make a finding as to the indigency of the party pursuant to the provisions of Tennessee Code Annotated section 40–14–202, which finding shall be evidenced by a court order.

(3) Upon finding a party indigent, the court shall enter an order appointing counsel unless the indigent party rejects the offer of appointment of counsel with an understanding of the legal consequences of the rejection.

(4)(A) When appointing counsel for an indigent defendant pursuant to section 1(e)(3), the court shall appoint the district public defender's office, the state post-conviction defender's office, or other attorneys employed by the state for indigent defense (herein "public defender") if qualified pursuant to this rule and no conflict of interest exists, unless in the sound discretion of the trial judge appointment of other counsel is necessary. Appointment of public defenders shall be subject to the limitations of Tennessee Code Annotated sections 8–14–201 et seq.

(B) If a conflict of interest exists as provided in Tennessee Rules of Professional Conduct 1.7 or the public defender is not qualified pursuant to this rule, the court shall designate counsel from the roster of private attorneys maintained pursuant to section 1(b).

(C) The court shall appoint separate counsel for indigent defendants having interests that cannot be represented properly by the same counsel or when other good cause is shown.

(D) The court shall not make an appointment if counsel makes a clear and convincing showing that adding the appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards.

(E) When the court appoints counsel pursuant to this subsection, the order of appointment shall assess the non-refundable administrative fee provided by Tennessee Code Annotated section 37–1–126(c)(1) or section 40–14–103(b)(1). Additionally the court shall consider the financial ability of the indigent party to defray a portion or all of the cost for representation by the public defender or a portion or all of the costs associated with the provision of court appointed counsel as provided by Tennessee Code Annotated sections 8–14–205(d)(1); 37–1–126(c)(2); or, 40–14–103(b)(2). If the court finds the indigent party is financially able to defray a portion or all the cost of the indigent party's representation, the court shall enter an order directing the indigent party to pay into the registry of the clerk of such court such sum as the court determines the indigent party is able to pay as specified by Tennessee Code Annotated section 40–14–202(e).

(5) Appointed counsel shall continue to represent an indigent party throughout the proceedings, including any appeals, until the case has been concluded or counsel has been allowed to withdraw by a court. See Tenn. Sup. Ct. R. 14 (setting out the procedure for withdrawal in the Court of Appeals and Court of Criminal Appeals); Tenn. Sup. Ct. R. 8, RPC 1.16.

(f)(1) Indigent parties shall not have the right to select appointed counsel. If an indigent party refuses to accept the services of appointed counsel, such refusal shall be in writing and shall be signed by the indigent party in the presence of the court.

(2) The court shall acknowledge thereon the signature of the indigent party and make the written refusal a part of the record in the case. In addition, the court shall satisfy all other applicable constitutional and procedural requirements relating to waiver of the right to counsel. The indigent party may act pro se without the assistance or presence of counsel only after the court has fulfilled all lawful obligations relating to waiver of the right to counsel.

Explanatory Comment:

Section 1(e)(1) has been revised for simplicity and organization. Section 1(e)(2) emphasizes that the finding of indigency must be evidenced by a court order. Section 1(e)(4)(A) is stricter than the former rule and emphasizes that trial courts "shall" appoint the public defender to represent criminal defendants unless a conflict of interest exists or in the sound discretion of the trial court, appointment of another counsel is necessary. Section 1(e)(4)(D) includes a specific standard that must be satisfied before counsel may refuse an appointment. Section 1(e)(4)(E) emphasizes that courts have a statutory duty to assess the administrative fee when appointing counsel as well as a statutory duty to consider whether the indigent party can afford to defray a portion or all of the costs of representation. Section 1(e)(5) clarifies that appointed counsel is obligated to represent the indigent party until a court allows counsel to withdraw. Section 1(f) delineates the rights of indigent parties and the obligations of courts when an indigent party chooses to proceed without counsel.

Section 2. Compensation of counsel in non-capital cases.

(a)(1) Appointed counsel, other than public defenders, shall be entitled to reasonable compensation for services rendered as provided in this rule. Reason-

LEXSEE 2002 US APP LEXIS 23425

ROBERT JINX CASTRO, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.

No. 01-2353

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

310 F.3d 900; 2002 U.S. App. LEXIS 23425; 2002 FED App. 0394P (6th Cir.); 54 Fed. R. Serv. 3d (Callaghan) 32

November 13, 2002, Filed

SUBSEQUENT HISTORY: [**1] As Corrected November 20, 2002.

COUNSEL: Robert Jinx Castro, Petitioner - Appellant, Pro se, Milan, MI.

For United States of America, Respondent - Appellee: Nancy A. Abraham, U.S. Attorney's Office, Flint, MI.

JUDGES: Before: KENNEDY and MOORE, Circuit Judges; DOWD, District Judge. *

* The Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

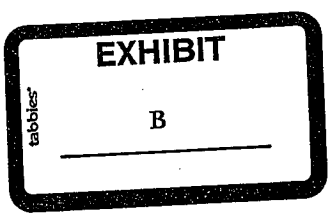
OPINION

[***1] [*901] **ORDER**

PER CURIAM. Robert Jinx Castro, a pro se federal prisoner, seeks to appeal a district court judgment denying his *28 U.S.C. § 2255* motion to vacate his sentence. Castro argues that he received ineffective assistance of counsel at sentencing because his lawyer failed to object to an inappropriate sentencing range and that his sentence violates *Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000)*. The district [***2] court rejected both arguments in denying Castro's *§ 2255* motion, but it neither denied nor granted Castro a certificate of appealability ("COA").

Castro filed a timely notice of appeal on September 28, 2001. According to the Federal Rules of Appellate Procedure, "if an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue." *Fed. R. App. P. 22(b)(1)*. [**2] Because the district court had yet to rule on a COA, the Sixth Circuit Clerk's Office sent a letter on January 2, 2002, asking the district court clerk to advise the district judge that, until he supplemented the record with a COA ruling, we would not be able to take further action. The district court has yet to grant or deny a COA in this case.

We have learned that the district judge is reluctant to issue a COA ruling because it is his policy to "decide whether to issue a COA only after a petitioner moves for such relief." *Brown v. United States, 187 F. Supp. 2d 887, 891 (E.D. Mich. 2002)*. In light of the district judge's reasoning in *Brown*, we can infer that he declined to issue or deny a COA in this case for three reasons. First, the district judge interprets *Murphy v. Ohio, 263 F.3d 466, 467 (6th Cir. 2001)*, as suggesting that district courts should wait for a petitioner to apply for a COA before issuing a COA ruling. *Brown, 187 F. Supp. 2d at 890*. Second, he believes that "the plain language of *Rule 22(b)(1)* shows that a petitioner must (1) move for a COA *and* (2) file a notice of appeal before [the district court] is [**3] required to decide whether a COA shall issue." *Id.* Finally, the district judge reasons "that prematurely ruling on a COA would effectively deprive many petitioners of the opportunity to prove that they are entitled to a COA" under the standard announced in *Barefoot v. Estelle, 463 U.S. 880, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983)*. *Brown, 187 F. Supp. 2d at 890*. Upon review, we conclude that the district court's justifications for refusing



to issue a COA ruling before a habeas petitioner applies for a COA are unpersuasive.

[***3] The district court's reliance on *Murphy* in its first argument is misplaced because *Murphy* is in conflict with this court's earlier decision that a district court may decide whether to issue a COA at the time of denial of habeas relief. *See Lyons v. Ohio Adult Parole Auth., 105 F.3d 1063, 1072 (6th Cir. 1997), overruled in part on other grounds by Lindh v. Murphy, 521 U.S. 320, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997).* A district judge must issue or deny a COA if an applicant files a notice of appeal pursuant to the explicit requirements of *Federal Rule of Appellate Procedure* [**4] *22(b)(1).* Furthermore, a district judge may issue or deny a COA when he rules on a habeas motion. *Lyons, 105 F.3d at 1072.* We explained in *Lyons* "that a district judge who has just denied a habeas petition. . . . will have an intimate knowledge of both the record and the relevant law and could simply determine whether to issue the certificate of appealability when she denies the initial petition." *105 F.3d at 1072. Murphy* suggests that a district judge should not rule on a COA until a petitioner applies for a COA. 263 F.3d at 467 (criticizing a district judge for "denying Murphy a COA before Murphy [*902] had even applied for one"). *Murphy* therefore conflicts with *Lyons* by implying that a district judge cannot decide a COA when denying habeas relief because the habeas petitioner obviously has yet to apply for a COA from the denial of relief. It is a well-established principle that "[a] panel of this Court cannot overrule the decision of another panel." *Salmi v. Sec'y of Health & Human Servs., 774 F.2d 685, 689 (6th Cir. 1985)* ("The prior decision remains controlling authority unless an inconsistent decision of the [**5] United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision."). Therefore, *Murphy* does not overrule our explicit authorization in *Lyons* for a district judge to "determine whether to issue the certificate of appealability when she denies the initial [habeas] petition." *Lyons, 105 F.3d at 1072.*

The district court's second argument for postponing COA determinations incorrectly interprets *Rule 22(b)(1)* to require that a petitioner *both* move for a COA *and* file a notice of appeal before the court rules on the COA. When interpreting statutory language, a court should interpret the statute as a [***4] coherent whole and give consistent meaning to terms throughout the statute. *See Jones v. Federated Fin. Reserve Corp., 144 F.3d 961, 964 (6th Cir. 1998)* (basic rule of statutory construction "requires us to read a statutory provision in a manner consistent with the statute's other provisions"); *First City Bank v. Nat'l Credit Union Admin. Bd., 111 F.3d 433, 438 (6th Cir. 1997)* ("It is a basic canon of statutory construction that phrases within a single statutory [**6] section be accorded a consistent meaning."); *Lyons, 105 F.3d at 1069* (internal citations omitted) (noting that the court must read the statute as a "coherent whole," being mindful that "the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail"). These principles apply to our construction of the Federal Rules of Appellate Procedure.

The language of *Rule 22* clearly requires that the district judge issue a COA ruling whenever an applicant files a notice of appeal. The district court believes that only someone who has moved for a COA can be an "applicant" filing a notice of appeal under *Rule 22.* The rules of statutory construction, however, lead us to a different interpretation of *Rule 22(b)(1).* In the context of *Rule 22*, the word "applicant" refers to someone who has applied for a writ of habeas corpus-not someone who has applied for a COA. *Rule 22(b)(1)* provides, in relevant part, "if an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue." This plainly requires a district court to issue a COA [**7] ruling when an applicant for a writ of habeas corpus files a notice of appeal. *See, e.g., Forbes v. United States, 1999 U.S. Dist. LEXIS 18979, 1999 WL 1133362* at *1 (S.D. N.Y. Dec. 10, 1999) (district court properly construing notice of appeal as a request for a COA). Furthermore, throughout *Rule 22(a)* and *(b)*, "applicant" refers to someone who has applied for a writ of habeas corpus, not someone who has applied for a COA. *Rule 22(a)* also repeatedly uses the word "application" to refer to an application for a writ of habeas corpus, and not to an application for a COA. Thus, the most coherent and consistent interpretation of the word "applicant" is someone [***5] who has filed an application for a writ of habeas corpus and not someone who has filed an application for a COA, as the district court concluded.

Finally, we also reject the district court's argument that ruling on a COA before a petitioner formally applies for one effectively deprives the petitioner of the [*903] opportunity to show his or her entitlement to a COA. A petitioner is entitled to a COA only if he "has made a

substantial showing of the denial of a constitutional right." *28 U.S.C. § 2253(c)(2)*. The Supreme [**8] Court has explained this standard as follows:

> To obtain a COA under *§ 2253(c)*, a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further."

Slack v. McDaniel, 529 U.S. 473, 483-84, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000) (quoting *Barefoot v. Estelle, 463 U.S. 880, 893, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 &* n.4, *463 U.S. 880, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983))*. The district court suggests that because petitioners rarely address the *Barefoot* standard for appellate review in their habeas proceedings in district court, a district court may deprive petitioners of their opportunity to address the standard for a COA by ruling on a COA before a petitioner applies for one. *Brown, 187 F. Supp. 2d at 890*. It is of course possible as well that under the framework mandated by *Rule 22(b)(1)*, a petitioner will file a notice of appeal unaccompanied by a motion [**9] for a COA, yet *Rule 22(b)(1)* requires the district judge to decide whether to issue a COA upon the filing of the notice of appeal. In either situation, should the district judge deny a COA, the petitioner could seek reconsideration of that decision, accompanied by a motion and brief in support of a COA. Moreover, *Rule 22(b)(1)* further provides that "if the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate." Finally, *Rule 22(b)(2)* provides that "if no express request for a certificate [***6] is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals." Thus the structure of *Rule 22(b)* clearly contemplates the decision on issuance of COAs by both district and court of appeals judges in circumstances where the applicant for a writ of habeas corpus has not filed a motion for a COA. We do encourage petitioners as a matter of prudence to move for a COA at their earliest opportunity so that they can exercise their right to explain their argument for issuance of a COA.

Therefore, we reject as unpersuasive the district judge's arguments in support of his policy "to decide whether to issue [**10] a COA only after a petitioner moves for such relief." *Brown, 187 F. Supp. 2d at 891*. *Rule 22(b)(1)* requires that the district court issue or deny a COA in accordance with the principles of *28 U.S.C. § 2253(c)(2)* and *(3)* once the petitioner has filed a notice of appeal. *Rule 22(b)(1)* also mandates that the district court clerk "must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings." *Fed. R. App. P. 22(b)(1)*. *Lyons* explicitly permits the district judge to "determine whether to issue the certificate of appealability when she denies the initial petition" for a writ of habeas corpus. *105 F.3d at 1072*. Whether the district judge determines to issue a COA along with the denial of a writ of habeas corpus or upon the filing of a notice of appeal, the district judge is always required to comply with *§ 2253(c)(2) & (3)* by "indicating which specific issue or issues satisfy the showing required," *28 U.S.C. § 2253(c)(3)*, i.e., a "substantial showing of the denial of a constitutional right." *28 U.S.C. § 2253(c)(2)*. [**11] Accordingly, because the petitioner has filed a notice of appeal in this case, we hereby remand this case to the [*904] district court so that it may either issue a COA or state why a certificate should not issue pursuant to *Rule 22(b)(1)* and *28 U.S.C. § 2253(c)*.

CONCUR BY: KENNEDY

CONCUR

[***7] KENNEDY, Circuit Judge, concurring. I concur in the panel's opinion but write separately to acknowledge the disadvantages that may result from following the procedure our opinion suggests.

First, the issuance of a certificate of appealability contemporaneously with the decision on the writ may result in appeal when otherwise no appeal would have been filed. Second, petitioner may have otherwise requested a COA on only one or two of the issues. Without such a request, the district judge must deal with all the issues raised in the petition for the writ perhaps causing the judge unnecessary work. Third, while the petitioner may move for reconsideration where the COA is entered with the opinion, the burden on the petitioner to persuade the judge to change a ruling is greater than the burden to persuade the judge to adopt that ruling as an initial matter.

However, I concur because [**12] *Fed. R. App. P. 22(b)(1)* requires the district court to issue a COA ruling and we have already approved its issuance at the time of the merits decision.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk

FOCUS - 1 of 119 DOCUMENTS

BOARD OF PROFESSIONAL RESPONSIBILITY v. WILLIAM DOUGLASS LOVE

No. M2007-00790-SC-R3-CV

SUPREME COURT OF TENNESSEE, AT NASHVILLE

2008 Tenn. LEXIS 323

February 13, 2008, Session
May 12, 2008, Filed

PRIOR HISTORY: [*1]

Tenn. Sup. Ct. R. 9, *§ 1.3*; Judgment of the Trial Court Affirmed in Part; Reversed in Part; and Remanded. Direct Appeal from the Chancery Court for Davidson County. No. 06-1096-I. Jerry Scott, Senior Judge, Sitting by Designation.

DISPOSITION: Judgment of the Trial Court Affirmed in Part; Reversed in Part; and Remanded.

COUNSEL: Gregory Robert Atwood, Nashville, Tennessee, for the appellant, William Douglass Love.

Sandy Garrett (oral argument) and Laura Chastain (brief), Nashville, Tennessee, for the appellee, Board of Professional Responsibility.

JUDGES: CORNELIA A. CLARK, delivered the opinion of the court, in which WILLIAM M. BARKER, C.J., and JANICE M. HOLDER, GARY R. WADE and WILLIAM C. KOCH, JR. joined.

OPINION BY: CORNELIA A. CLARK

OPINION

This is a direct appeal from a trial court's decision, which modified a hearing panel's judgment granting a suspended lawyer's Petition for Reinstatement of his law license contingent upon compliance with three conditions. In light of the change of the applicable standard of review on July 1, 2006, this case requires us to determine whether the trial court should have employed the standard in effect when the hearing panel rendered its decision or the standard in effect when the trial court heard [*2] and decided the case. It also requires us to address the circumstances under which a trial court is permitted to modify a hearing panel's decision. Because the trial court heard this case in August 2006, it should have adhered to the standard of review that became effective on July 1, 2006. This standard of review was not applied, and therefore, the trial court erred by modifying all but one of the hearing panel's reinstatement conditions. Accordingly, we reverse the trial court's judgment in part, affirm in part, and remand this case to the trial court for issuance of an order consistent with our holdings herein.

OPINION

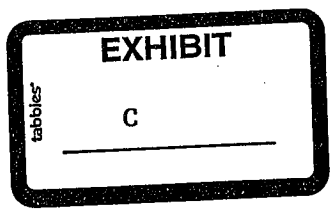
Factual and Procedural History

William D. Love ("Love") began practicing law in 1979 at thirty-six years of age. During his law career, Love worked in firm, partnership, and solo practitioner settings. In each of these settings, except for the early years of his career, Love limited his practice primarily to criminal law.

Both before and during his legal career, Love abused alcohol. Love first sought treatment for his abuse in 1990. At that time, Love spent eighteen days in a Veterans Administration hospital and another two-and-one-half years in an outpatient treatment [*3] program. Love's completion of the program, however, did not reduce his alcohol consumption; if anything, his drinking increased throughout the 1990s.

Disciplinary Proceedings

Love's excessive drinking compromised his ability to



practice law competently. In August 1987, September 1990, and October 1990, Love received private informal admonitions for neglect of client matters and failing to communicate with clients. In April 1991, he received a public censure for neglect of a legal matter resulting in the dismissal of his client's case. In August 1994, Love received a private reprimand for accepting a client's entire attorney fee and then failing to file the client's divorce case for more than six months.

On June 27, 1995, new disciplinary charges were filed against Love. This time, three different grounds were alleged. First, after accepting $ 500 from a client, Love failed to file a suit on the client's behalf. Second, after failing to file the claim, Love sent a letter to the client informing her that he was holding the $ 500 in his escrow account to cover the bond costs. At the time the letter was written, however, Love did not have a trust account. Third, Love accepted money from [*4] another client for whom he failed to provide legal services. After a hearing panel was convened and a decision rendered on these charges in May 1996, this Court suspended Love's law license for thirty days, retroactive to May 3, 1996 ("Suspension I"). [1] In addition to the suspension of Love's law license, we ordered Love to participate in an alcohol treatment program in conjunction with Nashville Lawyers Concerned for Lawyers, to complete an ethics course at an accredited law school, and to pay $ 4,280.00, the costs of his disciplinary proceedings.

1 Love delayed the adjudication of this case by failing to be evaluated for alcoholism. As a result, this Court's suspension order was not issued until April 7, 1999.

In December 1996, we suspended Love's law license for failure to complete his continuing legal education ("CLE") requirements from the preceding year ("Suspension II"). [2] On January 27, 1997, Love was disciplined again, this time for failing to represent two clients in their court matters. After a hearing panel was convened and the panel's decision rendered on October 22, 1997, this Court suspended Love's law license for one year. [3] Additionally, we suspended Love's law license [*5] indefinitely until such time that he completed three conditions: (1) restitution of $ 100 to each of the two clients that Love failed to represent properly; (2) compliance with all prior orders of the Board of Professional Responsibility ("Board"), including the conditions set forth in the Suspension I order; and (3) the ability to demonstrate in a reinstatement proceeding that he possesses the psychological and psychiatric competence to engage in the practice of law. We also ordered Love to pay the Board $ 3,011.42, the costs of these disciplinary proceedings ("Suspension III").

2 Although it is disputed in the record whether Love returned to the practice of law after this suspension, no other aspects of Suspension II are at issue in this case. Thus, Suspension II will not be further referenced.

3 The one year suspension began the day the order was issued, January 9, 1998.

Finally, on November 23, 1998, this Court entered an order suspending Love's law license for a three and one-half year period, retroactive to June 30, 1997, for theft ("Suspension IV"). The suspension resulted from a Conditional Guilty Plea entered into with the Board, in which Love admitted that from June 1995 to July [*6] 1996, while serving as conservator of his mother's affairs, he misappropriated more than $ 13,000.00 from the estate to pay his own car payments and money owed to a former wife. When the theft was brought to the attention of the District Attorney General, Love agreed to the filing of an information in the Davidson County Criminal Court. Love subsequently entered a conditional plea of guilty and was placed on judicial diversion for theft of over $ 10,000.00, a Class C felony. [4] See *Tenn. Code Ann. § 40-35-313* (1996). Under the plea's terms, Love was ordered to pay the estate [5] restitution of $ 7,000.00, with the balance to be taken from his inheritance, and to report to a probation officer every month for up to six years. Love complied with the first term by receiving $ 18,983.05 less than the other heirs under the estate distribution, but he failed to report to his probation officer for more than three months during his probationary period. Subsequently, his judicial diversion was terminated and his conditional guilty plea was changed to a standard guilty plea. Thus, Love was convicted of a felony.

4 During the Panel hearing, Love affirmatively answered that he conditionally pled guilty [*7] to a Class D felony. Theft of property of more than $ 10,000, but less than $ 60,000, however, is a Class C felony. See *Tenn. Code Ann. § 39-14-105* (1991).

5 Although the record is unclear, sometime after his theft, Love's mother passed away.

In addition to Love's three and one-half year suspension in this case, we suspended Love for an additional indefinite period until he met six conditions: (1) completion of an ethics course at a law school approved by the Tennessee Board of Law Examiners; (2) satisfactory completion of an alcohol treatment program approved by the Board; (3) demonstration of sobriety at the time of any reinstatement petition; (4) full compliance with all court restitution orders; (5) full restitution to the victims whether they have court judgments or not; and (6) payment to the Board for the proceeding costs in the amount of $ 1,752.65.

Reinstatement Proceedings

On July 28, 2005, Love filed a Petition for Reinstatement pursuant to *Tennessee Supreme Court Rule 9, section 19.3.* [6] The Board appointed a hearing panel ("Panel") to review the petition's merits. See Tenn. Sup. Ct. R. 9, *§ 19.3.* A hearing was held on February 17, 2006. The Panel found that Love had completed [*8] all but one of the requirements from Suspensions I, III, and IV necessary to be reinstated and had carried his burden of demonstrating:

> by clear and convincing evidence that [he] has the moral qualifications, competency and learning in law required for admission to practice law in this state and that the resumption of the practice of law within the state will not be detrimental to the integrity and standing of the bar or the administration of justice, or subversive to the public interest.

Id.

6 Love initially filed for reinstatement in 2004. However, there was some confusion between Love and the Board as to whether Love's completion of a CLE ethics course was enough to satisfy this Court's orders in Suspensions I and IV that Love take an ethics course at an accredited law school. When Love was told by the Board that the CLE course did not satisfy this condition, Love was allowed to rescind his Petition for Reinstatement without being subject to the successive petitions limitation. See *Tenn. Sup. Ct. R. 9, § 19.8* ("No petition for reinstatement under this Rule shall be filed within three years following an adverse judgment upon a petition for reinstatement filed by or on behalf of the same [*9] person.").

Specifically, the Panel found, with regard to Suspension I, that Love successfully completed an alcohol treatment program with the Tennessee Lawyers Assistance Program ("TLAP") and successfully completed an ethics course at the Nashville School of Law. As for Suspension III, the Panel found that Love made restitution to the two clients in the amount of $ 100.00 each and demonstrated, through his and others' testimony and the psychological report submitted by John W. Fite, Ph.D, that Love possesses the psychological and psychiatric competence necessary to engage in the practice of law. With regard to Suspension IV, the Panel found that Love had: (1) successfully completed an ethics course at an accredited law school; (2) participated, and continues to participate, in an alcohol treatment program with TLAP; (3) demonstrated, through his testimony, his wife's testimony, his former wife's testimony, and the testimony of Robert Albury Jr., Executive Director of TLAP, that he had been sober for more than three years; and (4) made full restitution to all victims and was in compliance with all restitution orders.

The Panel further concluded that Love's acts, which led to his multiple [*10] suspensions, were the direct result of his substance abuse problem, that Love is committed to his sobriety, and that, therefore, Love is unlikely to commit these acts in the future. Moreover, the Panel determined that Love demonstrated that he had the moral qualifications necessary to practice law, and, even though Love had "been absent from practice for seven years, [he] plainly demonstrated his competence and learning of the law required to practice law in this State." The Panel based this decision on Love's testimony, the testimony of other members of the Bar, [7] and the fact that as of the date of the hearing, Love was in compliance with all necessary CLE requirements. The Panel also determined that Love's readmission to practice would not be "detrimental to the integrity and standing of the bar or the administration of justice or subversive to the public interest." Tenn. Sup. Ct. R. 9, *§ 19.3.* This determination was based on witness testimony and the willingness of attorneys to assist Love with legal matters that may arise as he re-enters the practice of law. Finally, the Panel found that Love had not paid the Board the costs of the disciplinary hearings as required in Suspensions [*11] I, III, and IV.

7 Judge Carol Solomon, Circuit Court, Eighth Judicial Circuit; Judge Mark Fishburn, Davidson County Criminal Court, Sixth Division; Judge William E. Higgins, Davidson County General Sessions, Division VII; Judge Aaron Holt, Davidson County General Sessions, Division II; Robert Albury, Jr., Executive Director of the Tennessee Lawyer's Assistance Program; Richard Taylor, Sr., assistant district public defender; Robert A. Strong, Assistant District Attorney for Davidson County; Radaela Seifert, general counsel and senior vice-president of Community Health Systems; and C. Edward Fowlkes all testified on Love's behalf.

Pursuant to these findings, the Panel recommended that Love be reinstated to the practice of law subject to the following conditions: (1) that Love practice in a group practice or with a practice monitor for a period of one year from reinstatement; [8] (2) that he enter into a five-year contract with TLAP, consisting of standard protocols established by TLAP to monitor his sobriety; and (3) that he reimburse the Board for the past-due disciplinary fees, $ 9,043.07 [9] and that "such amount can be repaid by a payment plan agreeable to Disciplinary Counsel."

8 The condition [*12] that Love practice in a group setting or under the supervision of a practice monitor was not one originally requested by the Board, but was instead suggested sua sponte by TLAP Executive Director Albury during his testimony. It appears from the record that this suggestion was made to address Love's tendency to isolate himself. The Panel provided no definition of "group practice" or "practice monitor" in its order and to the best of this Court's knowledge, the Board has never supplied definitions for these terms. Neither party, however, objected to this recommendation.

9 Our review of this Court's Orders of Suspension shows that the total costs of Love's disciplinary proceedings are actually $ 9,044.07.

On May 2, 2006, pursuant to *Tennessee Supreme Court Rule 9, section 1.3*, the Board filed a Petition for Writ of Certiorari requesting that the Panel's judgment be modified in two ways. First, the Board argued that the Panel erred in finding that Love had been out of practice only seven years, instead of nine, and so should have been required to retake and successfully pass the Tennessee bar examination. [10] Second, the Board argued that the Panel should have required Love to pay the total [*13] costs of his disciplinary proceedings as a condition precedent to seeking reinstatement, as required by *Tennessee Supreme Court Rule 9, section 24.3*.

10 In Love's calculation, he was suspended from practice of law from June 30, 1997, until 2004, when he first attempted to apply for reinstatement. On the other hand, the Board's calculation of Love's suspension is from May 3, 1996, the retroactive date of the Suspension I order, until either the date of the filing of the Petition for Reinstatement, July 28, 2005, or the date of the Panel hearing, February 17, 2006.

We granted the Board's petition on May 25, 2006, and assigned a senior judge to "try the case." *Tenn. Sup. Ct. R. 9, § 1.5*. On July 1, 2006, prior to the case being heard, this Court amended the standard of review of a trial court in reviewing hearing panel decisions.

The trial court heard the matter on August 9, 2006, and after reviewing the entire record, additional testimony from Love, and the arguments of counsel, the trial court concluded that: "the findings of the Panel are correct and proper. However, the Court finds that each of the conditions recommended by the Hearing Panel should be modified and that an additional [*14] condition should be added." First, the trial court determined that the requirement of a group practice *or* the appointment of a practice monitor for *one* year was "inadequate." Instead, the trial court found that Love "should be required to practice in a group practice for *five* years *and* that he should have a practice monitor for *five* years." (first and third emphases added). Second, the trial court determined that the five-year contract requirement with TLAP should be extended to a ten-year contract. Third, the trial court found that the past-due disciplinary fees must be paid in full prior to the reinstatement of Love's law license. Fourth, the trial court added the condition that "Love must confine his law practice to criminal cases." In adding this limitation, the trial court stated that "[i]t does not appear that the retaking of the bar examination is necessary in this case." Although the trial judge ruled from the bench on August 9, written judgment was not entered until December 27, 2006.

On January 17, 2007, Love filed a Motion to Alter, Amend, or Modify Judgment, asking the trial court to

alter three of the four conditions of his reinstatement. [11] After a hearing was held on [*15] March 1, 2007, in which additional proof was presented, Love's motion was denied. Subsequently, Love filed a direct appeal to this Court, see Tenn. Sup. Ct. R. 9, *§ 1.3*, raising two questions: (1) whether the trial judge properly added restrictions and expanded conditions of reinstatement; and (2) whether the license to practice law held by an attorney in the State of Tennessee can be restricted to certain or particular areas of practice.

> 11 Love did not request in this pleading that the trial court alter, amend, or modify the condition that Love pay the costs of his disciplinary hearings as a condition precedent to reinstatement. Instead, Love filed a separate Motion to Pay Judgment in Installments.

Analysis

It is undisputed that Love had "the burden of demonstrating [to the hearing panel] by clear and convincing evidence that [he] has . . . competency and learning in law required for admission to practice law in this state." Tenn. Sup. Ct. R. 9, *§ 19.3*. The trial court's standard of review of the Panel's decision and our standard of review of the trial court's decision, however, are in dispute. Therefore, before this Court can address the two questions raised by Love, we must first determine [*16] what our standard of review of this case should be and what the trial court's standard of review of the Panel's decision was at the time of the trial court's hearing. We will address the latter standard first.

Trial Court's Standard of Review of a Hearing Panel's Decision

The Panel conducted its hearing on February 17, 2006 and filed its judgment on March 30, 2006. The Board filed its Petition for Writ of Certiorari on May 2, 2006. On all of these dates, a trial court was required to review a hearing panel's decision under the same standard, pursuant to *Tennessee Supreme Court Rule 9, section 1.3* (2005) ("old standard"). Effective July 1, 2006, the old standard was changed and replaced with a different standard of review. See Tenn. Sup. Ct. R. 9, *§ 1.3* (2007) ("new standard"). The trial court's hearing in this matter was conducted on August 9, 2006, after the new standard became effective. Because this matter involves proceedings both before and after the new standard of review became effective, we must determine whether the trial court should have employed the old standard or the new standard in reviewing the Panel's decision.

At the time of the Panel's hearing, *Tennessee Supreme Court Rule 9, section 1.3*, [*17] stated in pertinent part:

> The respondent or the Board may have a review of the judgment of a hearing committee in the manner provided by *[Tennessee Code Annotated section] 27-9-101 et seq.*, except as otherwise provided herein. The review shall be on the transcript of the evidence before the hearing committee, its findings and judgment and upon such other proof as either party may desire to introduce. The trial judge shall weigh the evidence and determine the facts by the preponderance of the proof.

Tenn. Sup. Ct. R. 9, *§ 1.3* (2005). Under this standard, the old standard, "[w]here the trial judge bases his or her decision on the same evidence that is before the hearing panel, the trial judge must affirm the panel unless that evidence preponderates against those findings." *Cohn v. Bd. of Prof'l Responsibility, 151 S.W.3d 473, 481 (Tenn. 2004)* (internal quotations omitted). However, under the old standard, the trial court could admit any "other proof as either party may desire to introduce." Tenn. Sup. Ct. R. 9, *§ 1.3* (2005).

Effective July 1, 2006, *Tennessee Supreme Court Rule 9, section 1.3*, was amended, and now states in pertinent part:

> The respondent-attorney (hereinafter "respondent") [*18] or the Board may have a review of the judgment of a hearing panel in the manner provided by *[Tennessee Code Annotated section] 27-9-101 et seq.*, except as otherwise provided herein. The review shall be on the transcript of the evidence before the hearing panel and its findings and judgment. If allegations of irregularities in the procedure before the panel are made, the trial court is authorized to take such additional proof as may be necessary to

> resolve such allegations. The court may affirm the decision of the panel or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the panel's findings, inferences, conclusions or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the panel's jurisdiction; (3) made upon unlawful procedure; (4) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (5) unsupported by evidence which is both substantial and material in the light of the entire record.
>
> In determining the substantiality of evidence, the court shall take into account whatever in the record [*19] fairly detracts from its weight, but the *court shall not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact.*

Tenn. Sup. Ct. R. 9, *§ 1.3* (2007) (emphasis added). Under the new, more limited standard of review, the trial court may modify or reverse a panel's decision in only the five enumerated circumstances, and the trial court's review is limited to the transcript of the evidence before the panel unless "allegations of irregularities in the procedure before the panel are made." Id. Therefore, given the greater limitations on a trial court's review under the new standard, we must determine which standard applied at the time of trial in order to determine whether the trial court erred in modifying the Panel's recommendations.

In Doe v. Board of Professional Responsibility, we adopted the procedure for interpreting Rule 9 and other rules promulgated by this *Court. 104 S.W.3d 465, 469 (Tenn. 2003)*. Noting that there "are well-established and well-known rules of construction which we apply when interpreting statutes enacted by legislative bodies," id., but that the rules of this Court are not drafted pursuant to a legislative delegation of [*20] power, [12] we resolved nonetheless to review this Court's rules in the same manner as statutes. As we stated, "Upon due consideration, we conclude that it is prudent for this Court to likewise apply the traditional rules of statutory construction to Rule 9 of the Rules of the Tennessee Supreme Court." Id. [13]

12 These same "well-established and well-known rules of construction" are also applicable to this Court's procedural rules that are promulgated by the joint actions of this Court and the General Assembly. See *Crosslin v. Alsup, 594 S.W.2d 379, 380 (Tenn. 1980)* (stating that "[t]he rules governing practice and procedure in the trial and appellate courts of Tennessee were promulgated by joint action of the General Assembly and the Supreme Court[, and therefore, they] have the force and effect of law"); *Tenn. Dep't of Human Servs. v. Vaughn, 595 S.W.2d 62, 63 (Tenn.1980)* (stating that Tennessee procedural rules "are 'laws' of this state, in full force and effect, until such time as they are superseded by legislative enactment or inconsistent rules promulgated by this Court and adopted by the General Assembly").

13 Moreover, other state courts that have addressed this issue have reached [*21] the same conclusion. See *People v. Roberts, 214 Ill. 2d 106, 824 N.E.2d 250, 256, 291 Ill. Dec. 674 (Ill. 2005)*; *In re KH, 469 Mich. 621, 677 N.W.2d 800, 803 (Mich. 2004)*; *Coyle v. Bd. of Chosen Freeholders of Warren County, 170 N.J. 260, 787 A.2d 881, 886 (N.J. 2002)*; *Walker v. Schneider, 477 N.W.2d 167, 172 (N.D. 1991)*.

Applying statutory construction principles, this Court, on numerous occasions, has addressed the circumstances in which a change in a statute applies either retroactively or prospectively. See, e.g., *In re D.A.H., 142 S.W.3d 267, 273 (Tenn. 2004)*; *Nutt v. Champion Int'l Corp., 980 S.W.2d 365, 368 (Tenn. 1998)*; *Kuykendall v. Wheeler, 890 S.W.2d 785, 787 (Tenn. 1994)*. The Tennessee Constitution states that "no retrospective law, or law impairing the obligations of contracts, shall be made." *Tenn. Const. art. 1, § 20*. Thus, a rule is presumed to operate prospectively unless there is a clear intent otherwise. There are, however, circumstances in which a rule may be deemed retroactive, even if no clear intent is provided. *Nutt, 980 S.W.2d at 368*. For example, rules considered remedial or procedural in nature apply retroactively, not only to causes of action arising before such acts become law, but also *to all actions pending when the* [*22] *law took effect*, unless a contrary intention is indicated or

immediate application would produce an unjust result. Id.; *Kee v. Shelter Ins., 852 S.W.2d 226, 228 (Tenn. 1993)*; *State Dep't of Human Servs. v. Defriece, 937 S.W.2d 954, 958 (Tenn. Ct. App. 1996)*.

Tennessee Supreme Court Rule 9, section 1.3, is procedural and remedial in nature. In Nutt, this Court defined remedial laws as those that "provid[e] means or method whereby causes of action may be effectuated, wrongs redressed and relief obtained." *980 S.W.2d at 368* (quoting *Defriece, 937 S.W.2d at 958*). This Court's stated purpose for modifying the disciplinary system rules was to "improve the disciplinary enforcement system for the benefit of the public and the members of the legal profession." Tenn. Sup. Ct. ORDER April 25, 2006. This language clearly suggests that amendments to the Tennessee Supreme Court rules were made to improve, or remedy, the disciplinary enforcement system. Moreover, as this Court stated in Nutt, a procedural statute is one that "does not affect the vested rights or liabilities of the parties" but instead "addresses the mode or proceeding by which a legal right is enforced." *980 S.W.2d at 368. Tennessee Supreme Court Rule 9, section 1.3*, [*23] does not affect Love's vested rights or liabilities. To the contrary, the rule focuses only on the way in which a trial court reviews a hearing panel's decision. And, because the new standard is procedural in nature and does not impair an obligation of contract, applying the new standard to trial court proceedings conducted after its effective date would not produce an unjust result. See *Kee, 852 S.W.2d at 228*. Accordingly, we hold that the new standard of review, which became effective July 1, 2006, was applicable during the trial court's August 9, 2006, hearing.

This Court's Standard of Review of a Trial Court's Decision

Having determined the applicable standard of review at the time of the trial court's hearing in this matter, we next decide what our standard of review is on appeal. Under the new standard, the basis for the trial court's modifications of the Panel's decision must be found in the enumerated circumstances listed in *Tennessee Supreme Court Rule 9, section 1.3* (2007). Therefore, unless the trial court concludes that:

> the panel's findings, inferences, conclusions or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the panel's jurisdiction; [*24] (3) made upon unlawful procedure; (4) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (5) unsupported by evidence which is both substantial and material in the light of the entire record[,]

Tenn. Sup. Ct. R. 9, *§ 1.3* (2007), the trial court cannot modify the Panel's decision under the new standard. Moreover, under the new standard, "the [trial] court shall not substitute its judgment for that of the panel as to the weight of the evidence on questions of fact." Id.

Tennessee Supreme Court Rule 9, section 1.3, is virtually identical to *Tennessee Code Annotated section 4-5-322(h)*, the statutory section covering judicial review under the Uniform Administrative Procedures Act ("UAPA"). *Tennessee Code Annotated section 4-5-322* provides the standard of review that Tennessee courts use when reviewing an administrative agency's "final decision in a contested case":

> The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (1) [*25] In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (5)(A) Unsupported by evidence which is both substantial and material in the light of the entire record.

Tenn. Code Ann. § 4-5-322(a)(1), (h)(1)-(5)(A) (2005). Additionally, "[i]n determining the substantiality of

evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Id. *§ 4-5-322(h)(5)(B)*. Thus, just like this Court's standard of review under UAPA cases, under *Tennessee Supreme Court Rule 9, section 1.3*, our standard of review is restricted to the record, and the hearing panel's findings "may not be reversed or modified unless arbitrary or capricious or characterized by an abuse, or clearly unwarranted exercise, of discretion and must stand if supported by substantial and material evidence." *CF Indus. v. Tenn. Pub. Serv. Comm'n., 599 S.W.2d 536, 540 (Tenn. 1980)*; [*26] see Tenn. Sup. Ct. R. 9, *§ 1.3* (2007).

Added Restrictions and Expanded Conditions of Reinstatement

Having determined the applicable standard of review at the time of the trial court's hearing in this matter and our standard of review on appeal, we now consider whether the trial court properly added restrictions and expanded conditions of reinstatement. As previously discussed, under the new standard, the basis for the trial court's modifications of the Panel's decision must be found in the enumerated circumstances listed in *Tennessee Supreme Court Rule 9, section 1.3* (2007).

The Panel's first reinstatement condition was that Love practice either in a group setting or under the supervision of a practice monitor for one year. Although neither party asked the trial judge to modify this condition, the trial court altered this condition in two respects: by requiring Love to practice in a group setting *and* be under the supervision of a practice monitor; and to do so for a period of *five* years. The trial court, however, cited no authority indicating that the Panel's original recommendation on this point violated constitutional or statutory provisions; was in excess of the Panel's authority; [*27] was based on unlawful procedure; was arbitrary and capricious; or was an abuse of discretion or a clearly unwarranted exercise of discretion. Moreover, the trial court did not conclude that the Panel's recommendations on this issue were unsupported by the evidence, and nothing in our review of the record indicates as such. Given the limitations placed on the trial court under the new standard of review, we find that the trial court's modification of the group practice/practice monitor recommendation was erroneous. Accordingly, we reverse the trial court and reinstate the Panel's recommendation with regard to this modification.

The Panel's second reinstatement condition was that Love enter into a five-year contract with TLAP, "consisting of standard protocols established by TLAP to monitor [Love's] sobriety." The trial court extended this contract to ten years. Again, there is nothing in the trial court's order that indicates why it made this modification to the Panel's decision or on what basis it was justified. To the contrary, the testimony of Robert Albury, Jr., made it clear that no prior TLAP contracts had ever extended beyond five years. Additionally, Love had been alcohol-free [*28] nearly four years at the time of the trial court's hearing. Again, given the limitations under the new standard of review and the trial court's statements with regard to this modification, we find that the trial court's action was unwarranted. Accordingly, we reverse the trial court on this issue and reinstate the Panel's recommendation of a five-year TLAP contract.

The Panel's third reinstatement condition was that Love reimburse the Board for his prior disciplinary fees in the amount of $ 9,044.07 and that "such amount can be repaid by a payment plan agreeable to Disciplinary Counsel." Agreeing with the Board's argument on this point, the trial court modified this recommendation by requiring Love to repay his total disciplinary proceeding costs as a *condition precedent* to reinstatement. For the reasons stated below, the trial court correctly modified the Panel's recommendation on this issue.

In its Writ of Certiorari, the Board alleged that the Panel erred in allowing Love to pay the total costs of his disciplinary hearings after his reinstatement, as compared to making it a condition precedent to reinstatement. Specifically, the Board argued that this finding was in violation of [*29] the plain language of *Tennessee Supreme Court Rule 9, section 24.3*, which states in pertinent part:

> In the event that a judgment of disbarment[] [or] suspension . . . results from formal proceedings, the Board shall assess against the respondent the costs of the proceedings . . . .
>
> . . .
>
> Payment of the costs assessed by the Board pursuant to this rule *shall be*

> *required as a condition precedent* to reinstatement of the respondent attorney.

(Emphasis added).

Under the new standard of review, the trial court can modify the decision of the Panel if "the rights of the petitioner have been prejudiced because the panel's findings, inferences, conclusions, or decisions are . . . [i]n violation of constitutional or statutory provisions." Tenn. Sup. Ct. R. 9, *§ 1.3* (2007). In this instance, the Panel, in allowing Love to repay his court costs "by a payment plan agreeable to Disciplinary Counsel," which included paying the costs subsequent to his reinstatement, incorrectly applied *Tennessee Supreme Court Rule 9, section 24.3*. [14] Therefore, the trial court did not err in modifying this portion of the Panel's recommendations for reinstatement. Accordingly, we affirm the trial court's order that Love's [*30] disciplinary fees be paid in full prior to the reinstatement of his law license. [15]

> 14 The Panel has the discretion to make reinstatement "conditional upon the payment of all or part of the costs of the proceeding." Tenn. Sup. Ct. R. 9, *§ 19.7*. However, the discretion to limit the amount owed does not also include the discretion to alter when the costs of the proceedings must be paid.
>
> 15 In his appeal to this Court, Love did not specifically challenge the trial court's recommendation that his disciplinary fees be paid as a condition precedent to the reinstatement of his law license. Instead, we address this issue to clarify *Tennessee Supreme Court Rule 9, section 24.3*.

Finally, the trial court added a fourth reinstatement condition that Love limit his practice to criminal law. In its Writ of Certiorari, the Board alleged that the Panel incorrectly determined that Love had been out of practice for only seven years, instead of nine, and as such, argued that the Panel erred in not requiring Love to retake and pass the Tennessee bar examination. The trial court did not grant the request, but substituted this condition for reinstatement instead.

Tennessee Supreme Court Rule 9, section 19.3, [*31] states that the petitioner "shall have the burden of demonstrating by clear and convincing evidence that [he or she] has . . . competency and learning in law required for admission to practice law in this state." Moreover, *Tennessee Supreme Court Rule 9, section 19.7*, provides that "reinstatement may be conditioned upon the furnishing of such proof of competency . . ., which proof may include . . . successful completion of [the bar] examination." This Court has previously held that there is a presumption that the successful completion of the essay portion of the bar examination is generally necessary if the petitioner has not practiced law for over ten years. See *Office of Disciplinary Counsel v. Davis, 696 S.W.2d 528, 532 (Tenn. 1985)*. However, taking the bar examination is not a mandatory reinstatement condition in every instance, even where the petitioner has not practiced law in over ten years. *Burnett v. Bd. of Prof'l Responsibility, 100 S.W.3d 217, 225 (Tenn. 2003)*. Instead, this Court has "clearly recognized that there will be exceptions and indicated that the presumption may be overcome by clear and convincing proof of 'extenuating circumstances.'" Id. Accordingly, when the [*32] length of suspension is for a period ten years or less, the hearing panel has the discretion, on a case by case basis, to require the retaking of the bar examination. In this instance, Love was in compliance with all CLE requirements as of the date of the Panel hearing. Love successfully passed an ethics course at the Nashville School of Law. He testified that he continues to read and review court decisions, receives and reads legal journals, and reviews changes in volumes 7 and 7a of the Tennessee Code Annotated (volumes addressing criminal offenses and criminal procedure). Through this testimony, the Panel determined that Love demonstrated by clear and convincing evidence that it was not necessary for him to retake and pass the bar examination.

Therefore, even if Love had been suspended from the practice of law for nine years, this alone would not necessitate a finding that Love retake the bar examination. Instead, the determinative issue is whether the petitioner carries his or her burden by clear and convincing evidence that he or she is competent and learned in the law. In this instance, the Panel determined that Love did not need to retake the bar examination. The Panel expressly [*33] stated that Love "plainly demonstrated his competence and learning of the law required to practice law in this State." Therefore, under the new standard, the trial court may modify or reverse a hearing panel's decision only if one or more of the five enumerated circumstances listed in *Tennessee Supreme Court Rule 9, section 1.3* is present. We find that none of the five enumerated circumstances were applicable on this issue, and therefore, the trial court erroneously

modified the Panel's determination that Love was competent in the law. We therefore, reverse the trial court's modification that Love limit his legal practice to criminal law. [16]

16 This holding pretermits the need to address Love's second question, whether a law license in the State of Tennessee can be restricted to only a certain or particular area of practice.

Conclusion

Under the new standard of review applicable to Board of Professional Responsibility hearing panel determinations, a trial court is permitted to modify or reverse a panel's decision only if certain circumstances are present. We have determined that no circumstances existed in this case to justify modification of the Panel's recommendations regarding the group [*34] practice/practice monitor and TLAP contract. For the same reasons, the trial court also erred in limiting Love's legal practice to criminal law. We therefore reverse the trial court's order with regard to these modifications. We affirm, however, the trial court's modification with respect to the repayment of Love's disciplinary costs, as this modification was warranted under the new standard of review. Accordingly, we remand this case to the trial court for issuance of an order consistent with our holdings herein.

Costs of this appeal are assessed equally, one-half to William Douglass Love, and his surety, and one-half to the Board of Professional Responsibility, for which execution may issue if necessary.

CORNELIA A. CLARK, JUSTICE

IN THE GENERAL SESSIONS COURT FOR KNOX COUNTY, TENNESSEE
~~DIVISIONS I, II, III, IV & V~~

IN RE: PETITION OF THE KNOX COUNTY PUBLIC DEFENDER-- SWORN PETITION TO SUSPEND APPOINTMENT OF THE DISTRICT PUBLIC DEFENDER TO DEFENDANTS IN THE KNOX COUNTY GENERAL SESSIONS COURT, MISDEMEANOR DIVISION.

SUPPLEMENTAL AFFIDAVIT OF ISSAC MERKLE

STATE OF TENNESSEE)
)
COUNTY OF KNOX)

Comes Issac Merkle, after first being duly sworn as required by law, and does hereby make oath and affirm that the following is a true and correct representation of fact:

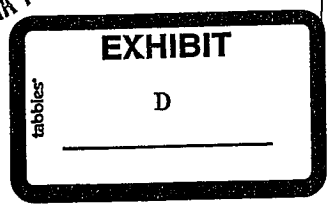
1. Using the same methodology detailed in my original affidavit, I have generated case statistics for the first nine months of FY2008.

2. In order to facilitate comparisons between FY2008 and previous years, it was necessary to estimate the work our office will do over the course of the final three months of FY2008.

3. A simplistic approach to this would be to assume that having completed ¾ of the fiscal year, the statistics generated represent 75% of the full year's activity. Subjectively, some months seem markedly busier than others, however; my concern was that I might over- or underestimate the full year's statistical counts by not taking into account seasonal variations.

4. In order to quantify seasonal variation, I produced counts of charges/filings opened each month for the last three full calendar years. I then calculated the percentage of calendar-year-total new charges/filings opened each month for each of the three years

FILED
MAY 27 2008
By MARTHA PHILLIPS, Clerk



5. As expected, this process exposed marked variation from month to month; as much as 3.6% in a single year. The seasonal variations, while following a similar pattern, weren't entirely consistent from year to year. This process exposed monthly deviations between .39% and 1.47% from year to year.

6. Rather than arbitrarily base projections on one particular previous year's patterns, I opted to average each month's contribution to the yearly total across the three years sampled.

7. To accomplish this, I totaled each month's charge/filing openings from all three sampled years. I then calculated the average percentage of total charges/filings that were opened each month. For example, in calendar year 2005, 8.6% of the year's total opened charges/filings were opened in January. In 2006, January accounted for 9.4% of the year's total. In 2007, the figure was 9.3%. On average, then, January accounts for 9.1% of a given year's filings (notably higher than the 8.3% one might expect).

8. Next, I totaled the average percentage calculated for the three months for which we do not yet have FY08 data – April, May and June. This figure is 25.47% - slightly more than the 25% one might guess. This means that the statistical counts we have for the first nine months of FY08 represent about 74.53% of what we'll see by the end of the fiscal year.

9. Inverting that percentage results in a multiplier of 1.34; that is, by multiplying current counts by 1.34, we can produce projected counts for the entire fiscal year.

10. We have opened 16,901 charges/filings so far this fiscal year; applying the above methodology produces a projected total of 22,678 charges filings opened by the end of the fiscal year.

11. Similarly, we've opened 8,579 new cases/incidents so far this fiscal year; following the above methodology suggests we'll have opened 11,511 cases/incidents by the end of the fiscal year.

12. The case statistics for the first nine months of FY2008 for the Knox County Public Defender's Community Law Office are attached to this affidavit, as are my projected full-year statistics.

Further, affiant saith not.

ISSAC MERKLE

Sworn to and subscribed before me
this the 23rd day of May 2008.

MELISSA HOWES
STATE OF TENNESSEE NOTARY PUBLIC
KNOX COUNTY

Melissa Howes
NOTARY PUBLIC

My commission expires: 10-2-11

¾ FY2008 STATISTICAL REPORT

OPENED CHARGES

	Criminal, Div I	Criminal, Div II	Criminal, Div III	Sessions, DUI	Sessions, Felony	Sessions, Misd	Juvenile	TN Court Crim App	Charge Level Total
1st Degree Murder	0	0	2	0	4	0	0	0	6
Felony, Class A	7	13	23	0	31	0	11	0	85
Felony, Class B	48	48	39	0	190	17	9	1	352
Felony, Class C	69	89	76	2	648	6	146	5	1,041
Felony, Class D	60	72	56	3	551	13	52	0	807
Felony, Class E	82	115	129	69	803	37	57	1	1,293
Misd, Class A	269	299	296	1,617	1,237	2,680	222	1	6,621
Misd, Class B	58	59	59	300	261	577	53	1	1,368
Misd, Class C	154	150	129	934	684	1,318	244	3	3,616
Juvenile Unruly	0	0	0	0	0	0	129	0	129
Probation	405	195	216	35	185	293	148	3	1,480
Fugitive From Justice	0	0	0	0	103	0	0	0	103
Court Total	**1,152**	**1,040**	**1,025**	**2,960**	**4,697**	**4,941**	**1,071**	**15**	**16,901**

Based on May 12, 2008 LegalPro data export

¾ FY2008 STATISTICAL REPORT

CLOSED CHARGES

	Criminal, Div I	Criminal, Div II	Criminal, Div III	Sessions, DUI	Sessions, Felony	Sessions, Misd	Juvenile	TN Court Crim App	Charge Level Total
1st Degree Murder	1	0	1	0	4	0	0	1	7
Felony, Class A	18	8	4	0	27	0	9	4	70
Felony, Class B	43	39	27	1	180	18	9	2	319
Felony, Class C	61	97	81	2	636	4	152	5	1,038
Felony, Class D	49	105	58	2	500	11	46	0	771
Felony, Class E	100	88	111	82	751	28	45	1	1,206
Misd, Class A	170	295	185	1,626	1,237	2,669	223	1	6,406
Misd, Class B	45	83	54	313	240	526	54	1	1,316
Misd, Class C	149	222	110	896	651	1,260	250	3	3,541
Juvenile Unruly	0	0	0	0	0	0	121	0	121
Probation	300	187	207	39	183	286	138	2	1,342
Fugitive From Justice	0	0	0	0	95	0	0	0	95
Court Total	936	1,124	838	2,961	4,504	4,802	1,047	20	16,232

Based on May 12, 2008 LegalPro data export

¾ FY2008 STATISTICAL REPORT

OPENED CASES

	Criminal, Div I	Criminal, Div II	Criminal, Div III	Sessions, DUI	Sessions, Felony	Sessions, Misd	Juvenile	TN Ct Crim App	Charge Level Total
1st Degree Murder	0	0	1	0	2	0	0	0	3
Felony, Class A	4	7	11	0	13	0	6	0	41
Felony, Class B	20	17	14	0	139	10	5	1	206
Felony, Class C	40	50	49	2	462	5	127	3	738
Felony, Class D	30	36	37	3	379	11	39	0	535
Felony, Class E	33	45	69	58	519	33	36	0	793
Misd, Class A	58	51	64	910	480	2,061	159	0	3,783
Misd, Class B	11	7	5	65	74	376	27	0	565
Misd, Class C	2	0	1	64	140	505	136	0	848
Juvenile Unruly	0	0	0	0	0	0	89	0	89
Probation	128	134	139	35	137	210	122	2	907
Fugitive From Justice	0	0	0	0	71	0	0	0	71
Court Total	**326**	**347**	**390**	**1,137**	**2,416**	**3,211**	**746**	**6**	**8,579**

Based on May 12, 2008 LegalPro data export

¾ FY2008 STATISTICAL REPORT

CLOSED CASES

	Criminal, Div I	Criminal, Div II	Criminal, Div III	Sessions, DUI	Sessions, Felony	Sessions, Misd	Juvenile	TN Court Crim App	Charge Level Total
1st Degree Murder	1	0	1	0	2	0	0	1	**5**
Felony, Class A	6	5	1	0	10	0	7	0	**29**
Felony, Class B	16	19	13	1	131	11	6	2	**199**
Felony, Class C	42	51	52	2	457	3	128	3	**738**
Felony, Class D	22	48	37	2	338	9	35	0	**491**
Felony, Class E	43	45	65	70	476	25	28	0	**752**
Misd, Class A	34	53	39	895	511	2,049	154	0	**3,735**
Misd, Class B	9	23	10	62	72	344	28	0	**548**
Misd, Class C	1	3	1	56	124	513	126	0	**824**
Juvenile Unruly	0	0	0	0	0	0	77	0	**77**
Probation	98	136	126	37	131	204	114	1	**847**
Fugitive From Justice	0	0	0	0	62	0	0	0	**62**
Court Total	**272**	**383**	**345**	**1,125**	**2,314**	**3,158**	**703**	**7**	**8,307**

Based on May 12, 2008 LegalPro data export

PROJECTED FY2008 FULL-YEAR STATISTICS

MONTHLY CHARGE/FILING ANALYSIS

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
CY2005	8.6%↑	7.6%↓	8.5%↑	7.6%↓	8.6%↑	8.6%↑	8.4%↑	10.3%↑	9.0%↑	8.4%↑	8.1%↓	6.3%↓
CY2006	9.4%↑	8.4%↑	8.8%↑	7.8%↓	8.7%↑	8.8%↑	8.4%↑	8.8%↑	8.1%↓	7.7%↓	8.1%↓	6.9%↓
CY2007	9.3%↑	9.0%↑	8.5%↑	8.5%↑	9.4%↑	8.4%↑	9.6%↑	9.3%↑	7.5%↓	7.7%↓	6.8%↓	6.0%↓
Average	**9.1%↑**	**8.3%=**	**8.6%↑**	**8.0%↓**	**8.9%↑**	**8.6%↑**	**8.8%↑**	**9.5%↑**	**8.2%↓**	**7.9%↓**	**7.7%↓**	**6.4%↓**

(ARROWS FOLLOWING PERCENTAGES INDICATE RELATIONSHIP TO 8.3%, THE EXPECTED MONTHLY PERCENTAGE IF ALL MONTHS CONTRIBUTED EQUALLY)

AVERAGE JUL-MAR PORTION OF TOTAL **25.5%**
AVERAGE APR-JUN PORTION OF TOTAL **74.5%**

MULTIPLIER TO PROJECT FULL YEAR **1.34**

¾ FY08 OPENED CHARGES **16,901**
PROJECTED FY08 OPENED CHARGES **22,678**

¾ FY08 OPENED CASES **8,579**
PROJECTED FY08 OPENED CASES **11,511**

40-14-103. Right to appointed counsel — Administrative fees. —

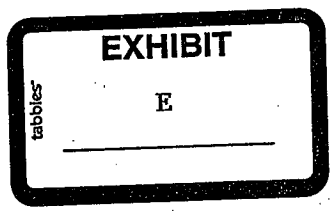
(a) If unable to employ counsel, the defendant is entitled to have counsel appointed by the court.

(b) (1) A defendant, who is provided with court-appointed counsel, shall be assessed by the court at the time of appointment a nonrefundable administrative fee in the amount of fifty dollars ($50.00). The administrative fee shall be assessed only one time per case and shall be waived or reduced by the court upon a finding that the defendant lacks financial resources sufficient to pay the fifty dollar ($ 50.00) fee. The fee may be increased by the court to an amount not in excess of two hundred dollars ($200) upon a finding that the defendant possesses sufficient financial resources to pay the fee in the increased amount. The administrative fee shall be payable, at the court's discretion, in a lump sum or in installments; provided, however, that the fee shall be paid prior to disposition of the case or within two (2) weeks following appointment of counsel, whichever occurs first. Prior to disposition of the case, the clerk of the court shall inform the judge whether the administrative fee assessed by the court has been collected. Failure to pay the administrative fee assessed by the court shall not reduce or in any way affect the rendering of services by court-appointed counsel; provided, however, that the defendant's willful failure to pay the fee may be considered by the court as an enhancement factor when imposing sentence if the defendant is found guilty of criminal conduct.

(2) The administrative fee shall be separate from and in addition to any other contribution or recoupment assessed pursuant to law for defrayal of costs associated with the provision of court-appointed counsel. The clerk of the court shall retain a commission of five percent (5%) of each dollar of administrative fees collected and shall transmit the remaining ninety-five percent (95%) of each dollar to the state treasurer for deposit in the state's general fund.

(3) If the administrative fee is not paid prior to disposition of the case, then the fee shall be collected in the same manner as costs are collected; provided, however, that upon disposition of the case, moneys paid to the clerk, including any cash bond posted by the defendant, shall be allocated to taxes, costs and fines and then to the administrative fee and any recoupment ordered. The administrative fee and any recoupment or contribution ordered for the services of court-appointed counsel shall apply and shall be collected even if the charges against the defendant are dismissed.

(4) As part of the clerk's regular monthly report, each clerk of court, who is responsible for collecting administrative fees pursuant to this section, shall file a report with the court and with the administrative director of the courts. The report shall indicate the following:



(A) Number of defendants for whom the court appointed counsel;

(B) Number of defendants for whom the court waived the administrative fee;

(C) Number of defendants from whom the clerk collected administrative fees;

(D) Total amount of commissions retained by the clerk from the administrative fees; and

(E) Total amount of administrative fees forwarded by the clerk to the state treasurer.

[Code 1858, § 5206; Shan., § 7170; Code 1932, § 11734; T.C.A. (orig. ed.), § 40-2003; Acts 1997, ch.

547, § 1.]

40-14-201. Part definitions. —

As used in this part, unless the context otherwise requires:

(1) "Indigent person" means any person who does not possess sufficient means to pay reasonable compensation for the services of a competent attorney; and

(2) "Public defender" means any attorney appointed or elected under the provisions of any act of the general assembly or any provision of a metropolitan charter to represent indigent persons accused of crime.

[Acts 1965, ch. 217, § 1; T.C.A., § 40-2014.]

40-14-202. Appointment by court. —

(a) In all felony cases, if the accused is not represented by counsel and the court determines by the manner provided in subsection (b) that the accused is an indigent person who has not competently waived the right to counsel, the court shall appoint to represent the accused either the public defender, if there is one for the county, or, in the absence of a public defender, a competent attorney licensed in this state. The court may call upon any legal aid agency operating in conjunction with an accredited college of law to recommend attorneys for appointment under the provisions of this part. The court may, upon its own motion or upon application of counsel appointed under this section, name additional attorneys to aid and assist in the defense. Each appointment of counsel shall be denoted by an appropriate entry upon the minutes of the court, which shall state the name of counsel and the date of counsel's appointment, but failure of the court to make such a minute entry shall not in any way invalidate the proceeding if an attorney was in fact appointed. Upon the appointment of an attorney under this section, no further proceeding shall be had until the attorney so appointed has had sufficient opportunity to prepare the case. If the court should determine that the accused is not an indigent person, the court shall then advise the accused with respect to the accused's right to counsel and afford the accused an opportunity to acquire counsel.

(b) Whenever an accused informs the court that the accused is financially unable to obtain the assistance of counsel, it is the duty of the court to conduct a full and complete hearing as to the financial ability of the accused to obtain the assistance of counsel and, thereafter, make a finding as to the indigency of the accused. All statements made by the accused seeking the appointment of counsel shall be by sworn testimony in open court or written affidavit sworn to before the judge.

(c) When making a finding as to the indigency of an accused, the court shall take into consideration:

(1) The nature of the services to be rendered;

(2) The usual and customary charges of an attorney in the community for rendering like or similar services;

(3) The income of the accused regardless of source;

(4) The poverty level income guidelines compiled and published by the United States department of labor;

(5) The ownership or equity in any real or personal property;

(6) The amount of the appearance or appeal bond, whether the party has been able to obtain release by making bond, and, if the party obtained release by making bond, the amount of money paid and the source of the money; and

(7) Any other circumstances presented to the court which are relevant to the issue of indigency.

(d) If a social service agency services the criminal justice system of the judicial district, and the court has reasonable cause to believe the accused has the financial resources to employ counsel, the court shall

order the agency to conduct an investigation into the financial affairs of the accused and report its findings directly to the court. The court shall consider the contents of the agency's report in making its determination and the report shall be made a part of the record in the cause.

(e) If the court appoints counsel to represent an accused in a felony case under this section or in a misdemeanor case as required by law, but finds the accused is financially able to defray a portion or all of the cost of the accused's representation, the court shall enter an order directing the party to pay into the registry of the clerk of the court any sum that the court determines the accused is able to pay. The sum shall be subject to execution as any other judgment and may also be made a condition of a discharge from probation. The court may provide for payments to be made at intervals, which the court shall establish, and upon terms and conditions as are fair and just. The court may also modify its order when there has been a change in circumstances of the accused.

(f) The clerk of the court shall collect all moneys paid by an accused pursuant to this section. When the accused fails to comply with the orders of the court, the clerk shall notify the court of the accused's failure to comply. At the conclusion of the proceedings in the trial court, the court shall order the clerk to pay to the attorney of record any funds that the clerk collected from the accused. The clerk of the court shall receive a commission of five percent (5%) of the moneys collected for the clerk's services in collecting, handling and making payment pursuant to the order of the court; provided, that in counties having a population of more than seven hundred thousand (700,000), according to the 1990 federal census or any subsequent federal census, the commission shall be ten percent (10%).

(g) Counsel who receives payment pursuant to the terms of this section, and who makes application for additional funds for expenses incurred and services rendered, shall report the payment in a report to the court to be made a part of the record in the cause.

(h) No court shall appoint a member of the general assembly as counsel for an indigent defendant unless the judge of the court certifies that no other equally competent attorney is available to represent the defendant. If the judge so certifies, it shall not be considered a conflict of interest for the member to represent the defendant or to be compensated for the representation in the same manner and amount as other court appointed attorneys.

(i) (1) Every accused who informs the court that the accused is financially unable to obtain the assistance of counsel shall be required to complete the uniform affidavit of indigency.

(2) It is a Class A misdemeanor for any person to intentionally or knowingly misrepresent, falsify or withhold any information required by an affidavit of indigency.

(j) Before and during the trial of a criminal matter, the cover sheets that reflect the total fees and expenses paid to defense counsel and that reflect the total amount paid for expert services from public funds for the use in representing an indigent criminal defendant or prosecuting a criminal defendant are a public record. In addition, a record of the total amount paid to an expert from public funds is a public record if the expert has offered evidence and is known to the public because of testimony on the record. Before and during the trial of a criminal matter, detailed attorney fees and expense claims, motions and orders dealing with the authorization of expert services and detailed time sheets of undisclosed experts shall be sealed and unavailable for public inspection.

[Acts 1965, ch. 217, § 4; 1979, ch. 354, §§ 1, 2; T.C.A., § 40-2017; Acts 1986, ch. 878, §§ 1, 7; 1992, ch. 892, § 1; 1995, ch. 456, § 8; 1996, ch. 865, § 1; 1998, ch. 876, § 1.]

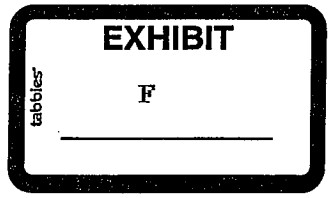
8-14-201. Indigent person — Defined. —

For the purposes of this part, an "indigent person" is one who does not possess sufficient means to pay reasonable compensation for the services of a competent attorney:

(1) In any criminal prosecution or juvenile delinquency proceeding involving a possible deprivation of liberty; or

(2) In any habeas corpus or other post-conviction proceeding.

[Acts 1989, ch. 588, § 1; 1991, ch. 345, § 1.]



8-14-204. District public defender — Duties. —

(a) The district public defender has the duty and responsibility of representing indigent persons for whom the district public defender has been appointed as counsel by the court. Either personally or through an assistant district public defender, the district public defender shall counsel with the accused and represent such accused in the trial court. If the accused is aggrieved by the judgment of the trial court imposing a sentence of imprisonment, or dismissing a habeas corpus or post-conviction petition, the district public defender shall advise such accused fully concerning rights of appellate review.

(b) If the accused desires to appeal to an appellate court, the district public defender shall seasonably take all steps necessary to perfect the appeal, including a new trial motion when required and the filing of all essential transcripts and records with the clerk of the appellate court.

(c) The district public defender has the duty and responsibility of handling all appeals filed by an indigent person represented in the trial courts of this state.

(d) At such times and in such form and manner as may be directed by the secretary of the judicial council, each executive director of the district public defenders conference shall submit reports reflecting the number, kind, status and disposition of all cases and proceedings.

[Acts 1989, ch. 588, § 4; 1990, ch. 751, §§ 1, 2; 1996, ch. 610, § 4.]

8-14-205. Determination of indigency — Appointment of counsel — Multiple defendants — Law students. —

(a) When any person appears without counsel before any court of this state exercising original jurisdiction (whether magistrate, general sessions, municipal, juvenile, circuit, criminal or any court empowered to deprive the person of liberty) upon a criminal prosecution or juvenile delinquency proceeding involving a possible deprivation of liberty, the court shall inquire whether such person is financially able to employ counsel. If the person claims to be without such means, the court shall examine such person and any witnesses the indigent person or the court may call and proceed to determine whether the person is indigent. The determination shall not be based alone on the person's ability to make a bail bond, but the court shall consider income, property, obligations, the number and ages of dependents and any other matters deemed pertinent.

(b) In all habeas corpus and post-conviction proceedings, the court having original jurisdiction of the matter shall determine the question of the petitioner's indigency if such is claimed.

(c) In every case arising under this section, the court's determination of indigency or nonindigency shall be reduced to writing and signed by the court and filed with the papers of the cause. If the court is one of record, the court's determination shall also be entered upon its official minutes.

(d) If the court determines that the person is indigent, as defined in § 8-14-201, and the person has not waived the right to counsel, the court shall make and sign an order appointing the district public defender, or such other appointed counsel as provided by law, to represent the person. The original of the order shall be filed with the papers of the cause, and if the court is one of record, the order shall also be entered upon its official minutes.

(1) If the court appoints the district public defender to represent an accused in any proceeding under this section, but finds the accused is financially able to defray a portion or all the cost to the state of representation by the public defender, then the court shall enter an order directing the party to pay into the registry of the clerk of such court such sum of money as the court determines the accused is able to pay. Such sum shall be subject to execution as any other judgment and may also be made a condition of discharge from probation. Such sum as ordered by the court shall be paid by the accused independently and separately from any fines and costs associated with the cause, and such moneys paid by the accused and collected by the clerk of the court pursuant to this section shall be collected independently and separately from any fines and costs associated with the cause and be applied directly to the sum ordered by the court to be paid under this section. The court may provide for payments to be made at intervals, which the court shall establish, and upon such terms and conditions as are fair and just. The court may also modify its order when there has been a change in the circumstances of the accused.

(2) The clerk of the court shall collect all moneys paid by an accused pursuant to this section. When the accused fails to comply with the orders of the court, the clerk shall notify the court of the accused's failure to comply. The clerk shall, at the end of each month, pay to, and forward all payments received pursuant to, this section to the office of the executive director of the district public defenders conference. The clerk of the court shall receive a commission of five percent (5%) of all moneys collected pursuant to the order of the court; provided, that in counties having a population of more than seven hundred thousand (700,000), according to the 1990 federal census or any subsequent federal census, such

commission shall be ten percent (10%).

(e) In any case or proceeding wherein there is more than one (1) indigent person accused, one (1) such person shall be represented by the district public defender's office, and the court shall appoint an attorney to represent such other indigent persons. Such other indigent persons may also be represented by the district public defender's office; provided, that the court makes an affirmative finding prior to the appointment that no conflict of interest exists and it appears there is good cause to believe no conflict of interest is likely to arise. The original of the order shall be filed with the papers of the cause, and if the court is one of record, the order shall also be entered upon its official minutes.

(f) In any case when the trial court is of the opinion that proper representation of an indigent person or persons makes it necessary to do so, the court may for that purpose appoint one (1) or more senior law students actively participating in a legal aid clinic operated by an approved law school located in the judicial district, in accordance with Tennessee Supreme Court Rule 7. The legal aid clinic shall be notified promptly of the appointment and shall be furnished a copy of the order of appointment. The original of the order shall be filed with the papers of the cause, and if the court is one of record, the order shall also be entered upon its official minutes.

(g) All attorneys and law students appointed as provided in subsections (e) and (f) shall be paid by the state pursuant to §§ 40-14-207 and 40-14-208.

(h) Upon the appointment of the district public defender, and/or an attorney pursuant to subsections (e) and (f), no further proceedings shall be had in the case until such counsel has had reasonably sufficient time and opportunity to prepare the case for trial. District public defenders shall be authorized access to query state and federal criminal records history information as the duties of their office may require.

(i) If the court determines that the person accused or proceeded against in any criminal prosecution or other proceeding involving a possible deprivation of liberty, or the person filing a habeas corpus or other post-conviction proceeding is not an indigent person, the court shall advise such person with respect to right to counsel and afford such person a reasonable time, to be fixed by the court, and opportunity to secure counsel and shall stay further proceedings until counsel so obtained has had reasonable time and opportunity to prepare the case for trial.

[Acts 1989, ch. 588, § 5; 1990, ch. 751, § 3; 1991, ch. 345, §§ 3, 4; 1995, ch. 456, § 5; 1996, ch. 610, § 4; 1999, ch. 165, § 5.]

or other applicable law. In the event of an adverse ruling, the lawyer should consult with the client about the possibility of appealing the adverse ruling. See RPCs 1.4 and 1.2. Unless an appeal is taken, the lawyer must comply with the order.

Acting Competently to Preserve Confidentiality

(18) A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or by other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See RPCs 1.1, 5.1, and 5.3.

(19) When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer utilize special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Clients

(20) The duty of confidentiality continues after the client-lawyer relationship has been terminated. See RPC 1.9(c).

Definitional Cross-References

"Consultation" See RPC 1.0(c)

"Fraud" See RPC 1.0(e)

"Reasonably" See RPC 1.0(i)

"Reasonably Believes" See RPC 1.0(j)

"Substantial" See RPC 1.0(l)

"Tribunal" See RPC 1.0(m)

Rule 1.7. Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents in writing after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents in writing after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(c) A lawyer shall not represent more than one client in the same criminal case, unless

(1) the lawyer demonstrates to the tribunal that good cause exists to believe that no conflict of interest prohibited under this Rule presently exists or is likely to exist; and

(2) each client consents in writing after consultation concerning the implications of the common representation, along with the advantages and risks involved.

[Adopted September 17, 2002, effective March 1, 2003.]

Comments

Loyalty to a Client

(1) Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether actual or potential conflicts of interest exist.

(2) If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See RPC 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see the Comment to Rule 1.3 and the statement in the Preamble about the Scope of these Rules.

(3) As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as an advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

(4) Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or otherwise foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

EXHIBIT
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Consultation and Consent

(5) A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such an agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

(6) In the absence of other law to the contrary, a government official or entity, like any other client, may waive a conflict of interest under this Rule.

(7) This Rule requires the lawyer either to secure a written consent executed by the client or to memorialize an oral consent given by the client. See RPC 1.0(b) Definitions (defining "Consents in Writing"). If it is not feasible to secure or memorialize the writing either at the time the conflict arises or at the time the client gives consent, then the lawyer must secure or memorialize it within a reasonable time thereafter. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened by a conflict of interest, to explain the reasonably available alternatives, and to afford the client an opportunity to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision they are being asked to make and to resolve disputes or ambiguities that might later occur by virtue of there being no writing. The writing need not take any particular form; it should, however, include disclosure of the relevant circumstances and reasonably foreseeable risks of the conflict of interest, as well as memorialization of the client's agreement to the representation despite such risks.

Lawyer's Interests

(8) The lawyer's own interests should not be permitted to have an adverse effect on the representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See RPCs 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation

(9) Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, by an incompatibility in positions in relation to an opposing party, or by the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in both civil and criminal cases. However, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare RPC 2.2 (involving intermediation between clients).

(10) The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. However, where the lawyer chooses to undertake such a joint representation, paragraph (c) requires that the lawyer demonstrate to the satisfaction of the tribunal that good cause exists to believe that no conflict of interest prohibited by paragraph (b) presently exists or is likely to exist in the future. This showing reflects the same standard currently required by Tennessee Rule of Criminal Procedure 44(c).

(11) However, to avoid the premature disclosure of defense tactics, strategy, or other information relating to the representation, defense counsel may request that the tribunal hold an ex parte hearing to determine the propriety of the joint representation. See RPC 3.3(a)(3) (setting forth a lawyer's duty of candor in an ex parte hearing); see also RPC 3.5(b) (permitting a lawyer to speak ex parte to a judge when permitted to do so by law). Once the tribunal is satisfied that no good cause exists to believe that a conflict of interest currently exists or is likely to exist, a rebuttable presumption arises throughout the proceedings that the joint representation comports with the requirements of this Rule. However, this presumption in no way relieves counsel of any duty imposed under these Rules should such an actual conflict of interest later arise.

(12) Ordinarily, a lawyer may not act as an advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as an advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

(13) Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action in behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken by the lawyer on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include where the cases are pending; whether the issue is substantive or procedural; the temporal relationship between the matters;

the significance of the issue to the immediate and long-run interests of the clients involved; and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

Interest of Person Paying for a Lawyer's Service

(14) A lawyer may be paid from a source other than the client if the client is informed of that fact and consents and if the arrangement does not compromise the lawyer's duty of loyalty to the client. See RPC 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other Conflict Situations

(15) Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for an adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

(16) For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them. See Rule 2.2 with respect to a lawyer serving two or more clients as an intermediary.

(17) Members of a family may reasonably seek joint representation by a single lawyer in a matter affecting the family. Conflict questions may arise in such circumstances. For example, in estate planning, a lawyer may be called upon to prepare wills for family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. Resolution of conflicts of interest between family members pursuant to this Rule must be consistent with the lawyer's duty of undivided loyalty to each client, but the lawyer may take into account the willingness of each individual client to accommodate the interests of the family as a whole or the individual interests of other family members. In estate administration, the identity of the client may be unclear. Under one view, the client is the fiduciary; under another view, the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

(18) A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

(19) Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

Special Considerations in Joint Representation

(20) In considering whether to represent clients jointly in the same matter, such as representing co-plaintiffs or co-defendants, a lawyer should be mindful that if the joint representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment, and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the joint representation fails, unless each client consents after consultation.

(21) A particularly important factor in determining the appropriateness of joint representation is the effect on lawyer-client confidentiality and the attorney-client privilege. With regard to the evidentiary attorney-client privilege, the prevailing rule is that as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that the privilege will not protect any such communications if litigation eventuates between the clients, and the clients should be so advised.

(22) As to the duty of confidentiality, joint representation will almost certainly be inadequate if one client attempts to keep something in confidence between the lawyer and that client, which is not to be disclosed to the other client. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and to expect that the lawyer will use that information to that client's benefit. See RPC 1.4. The lawyer should, at the outset of the joint representation and as part of the process of obtaining each client's consent, advise each client that the lawyer will share all information material to the representation with each of the jointly represented clients, unless specifically instructed by one of the clients not to do so. The lawyer should also advise each client that the lawyer will abide by the client's instructions to maintain the confidentiality of the specified information if any client later insists that some matter material to the representation should be kept from the other, but that it is likely that the lawyer will be required to withdraw from the representation. In limited circumstances, however, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential.

(23) Subject to the above limitations, each client in the joint representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. Each client also has the right to discharge the lawyer as stated in Rule 1.16.

Relation to Other Rules

(24) When a lawyer represents a client in a partisan role, whether as an advocate, an advisor, or the author of a legal opinion to be rendered on behalf of the client for use by a third person, this Rule provides special protections for the client to assure that the lawyer's loyalty will not be diluted by interests of other clients, the lawyer, or third persons. This Rule, however, is not applicable to conflicts of interest affecting clients the lawyer undertakes to serve as an intermediary. If, for example, business persons or members of a family are seeking the lawyer's advice or assistance in a non-adversarial effort to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual relation between them, such as the formation of a business or a purchase or sale of property, Rule 2.2 applies. Similarly, if the effectuation of an estate plan or other gratuitous transfer entails the formation, modification, or termination of a consensual legal relationship between clients, and the lawyer acts as an intermediary in connection with the transaction, Rule 2.2 applies. Otherwise, this Rule applies. Nor is this Rule applicable to conflicts of interest affecting parties who a lawyer undertakes to serve as a dispute resolution neutral. See RPC 2.4.

Definitional Cross-References

"Consents in Writing" See RPC 1.0(b)

"Consultation" See RPC 1.0(c)

"Materially" See RPC 1.0(g)

"Reasonably Believes" See RPC 1.0(j)

Rule 1.8. Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client; and

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents thereto in a writing signed by the client.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client, unless the client consents after consultation, except as otherwise permitted or required by Rule 1.6 or Rule 3.3.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of the representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation or direction from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless:

(1) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(2) each client consents in writing after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) enter into an agreement with a prospective, current, or former client to prospectively limit the lawyer's liability to the client for malpractice; or

(2) settle a claim for such liability, unless:

(a) the client is represented in the matter by independent counsel; or

(b) the lawyer fully discloses all the terms of the agreement to the client in a manner that can reasonably be understood by the client, advises the client to seek the advice of independent counsel, and affords the client a reasonable opportunity to do so.

(i) A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer, unless the client consents in writing after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation

FOCUS - 1 of 2 DOCUMENTS

JOHN DOE, ET AL. v. BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE, ET AL.

No. M2002-02076-SC-R23-CQ

SUPREME COURT OF TENNESSEE, AT NASHVILLE

104 S.W.3d 465; 2003 Tenn. LEXIS 371

May 8, 2003, Filed

SUBSEQUENT HISTORY: Released for Publication May 5, 2003. As Corrected May 13, 2003.

PRIOR HISTORY: [**1] Tenn. Sup. Ct. R. 23 Certified Question of Law. United States District Court for the Western District of Tennessee. Hon. Julia Smith Gibbons, Judge.
Doe v. Bd. of Prof'l Responsibility, 2002 Tenn. LEXIS 713 (Tenn., Dec. 23, 2002)

DISPOSITION: Certified question answered.

CASE SUMMARY:

PROCEDURAL POSTURE: In federal court, plaintiff non-lawyer sued defendant Board of Professional Responsibility of the Supreme Court of Tennessee (Board), challenging the constitutionality of Tenn. Sup. Ct. R. 9, § 25. The United States District Court for the Western District of Tennessee certified questions of law regarding the construction of Rule 9, § 25.

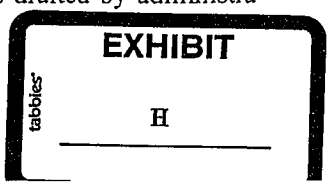
OVERVIEW: The non-lawyer filed a complaint with the Board against an attorney and desired to speak publicly about the complaint. In the non-lawyer's constitutionality suit, the Board argued that the non-lawyer lacked standing. The federal court sought to know whether the non-lawyer could be charged with contempt for disclosing that he filed a complaint with the Board against an attorney in violation of the confidentiality provision embodied in Tenn. Sup. Ct. R. 9, § 25, and, if so, by whom and before what tribunal. The state court determined that, inter alia: (1) the confidentiality requirement applied to a layperson who filed a complaint against an attorney with the Board; (2) an appropriate sanction for a violation of Rule 9, § 25 was an action for contempt; (3) an action for contempt may be initiated by any person whose rights under Rule 9, § 25 were violated; (4) the Supreme Court of Tennessee or the Board could pursue an action for contempt; and (5) a charge of contempt was to be filed first with the Supreme Court of Tennessee, whereupon assignment shall issue to special master to make findings of fact.

OUTCOME: The court accepted certification and construed the rule at issue.

LexisNexis(R) Headnotes

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Prior Restraint
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Standing
Legal Ethics > Professional Conduct > General Overview
[HN1] Tenn. Sup. Ct. R. 9, § 25 requires that all proceedings involving allegations of misconduct by an attorney be kept confidential, and that all participants in the proceeding conduct themselves so as to maintain the confidentiality of the proceeding.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview
Administrative Law > Separation of Powers > Legislative Controls > General Overview
Governments > Legislation > Interpretation
[HN2] There are well-established and well-known rules of construction which the court applies when interpreting statutes enacted by legislative bodies. In addition, the court also applies these general rules of statutory construction to rules and regulations drafted by administra-



tive agencies pursuant to a legislative delegation of power.

Governments > Courts > Rule Application & Interpretation
Legal Ethics > Sanctions > Disciplinary Proceedings > General Overview
[HN3] It is prudent for the Supreme Court of Tennessee to apply the traditional rules of statutory construction to Tenn. Sup. Ct. R. 9.

Governments > Legislation > Interpretation
[HN4] The court's role in statutory construction is to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope. The court determines intent from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning. Moreover, in construing a statute, all sections are to be construed together in light of the general purpose and plan. Furthermore, the rules of statutory construction direct the court not to apply a particular interpretation to a statute if that interpretation would yield an absurd result.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > General Overview
Governments > Courts > Authority to Adjudicate
Legal Ethics > Practice Qualifications
[HN5] Because the Supreme Court of Tennessee is the court of last resort in Tennessee, the Supreme Court of Tennessee possesses the inherent supervisory power to regulate the practice of law in Tennessee.

Governments > Courts > Rule Application & Interpretation
Legal Ethics > Practice Qualifications
Legal Ethics > Sanctions > Disciplinary Proceedings > Investigations
[HN6] All licensed attorneys within Tennessee are subject to the jurisdiction of the Supreme Court of Tennessee, and its agent, the Board of Professional Responsibility of the Supreme Court of Tennessee. The Board is charged under Tenn. Sup. Ct. R. 9 with investigating any alleged ground for discipline or alleged incapacity of any attorney, and to take appropriate action to effectuate the purposes of the disciplinary rules.

Legal Ethics > Professional Conduct > General Overview
Legal Ethics > Sanctions > Disciplinary Proceedings > Investigations
[HN7] The Board of Professional Responsibility of the Supreme Court of Tennessee is charged under Tenn. Sup. Ct. R. 9 with investigating attorney misconduct and disciplining, or requesting discipline by the Supreme Court of Tennessee for, attorneys found to have violated standards of professional conduct. One principal feature of the Board's authority when conducting investigations is that the information and charges are to remain confidential pursuant to Tenn. Sup. Ct. R. 9, § 25.

Legal Ethics > Sanctions > Disciplinary Proceedings > Investigations
[HN8] See Tenn. Sup. Ct. R. 9, § 25.

Administrative Law > Separation of Powers > Jurisdiction
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Consent
[HN9] When an individual seeks affirmative relief from a tribunal, or acts in a manner inconsistent with the claim of absence of jurisdiction, he is said to consent to the jurisdiction of that tribunal.

Civil Procedure > Sanctions > Contempt > General Overview
Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Contempt > General Overview
[HN10] One may not be held in contempt unless he or she violates a specific order of a tribunal properly having jurisdiction of that person.

Legal Ethics > Sanctions > Disciplinary Proceedings > Investigations
Legal Ethics > Sanctions > Reprimands
[HN11] See Tenn. Sup. Ct. R. 9, § 8.

Legal Ethics > Sanctions > Disciplinary Proceedings > Hearings
[HN12] See Tenn. Sup. Ct. R. 9, § 8.2.

Administrative Law > Agency Investigations > Scope > Subpoenas
Civil Procedure > Pretrial Matters > Subpoenas
Governments > Courts > Rule Application & Interpretation

[HN13] If a formal proceeding as described in Tenn. Sup. Ct. R. 9, § 8 commences, the Board of Professional Responsibility of the Supreme Court of Tennessee is authorized under Tenn. Sup. Ct. R. 9, § 13.1 to obtain subpoenas from the circuit or chancery courts of Tennessee. Subpoenas issued in connection with a confidential investigation compel the appearance of witnesses to give evidence in such formal proceedings.

Legal Ethics > Sanctions > Disciplinary Proceedings > Investigations
[HN14] The essence of Tenn. Sup. Ct. R. 9, § 25 mandates that until one of the enumerated events occur: (1) all proceedings surrounding allegations of misconduct by an attorney be "kept confidential;" and (2) all participants in the proceeding shall conduct themselves so as to maintain the confidentiality of the proceeding.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue
Governments > Courts > Judges
Governments > Courts > Rule Application & Interpretation
[HN15] Tenn. Sup. Ct. R. 9, among other things, establishes the Board of Professional Responsibility of the Supreme Court of Tennessee. The Board, its authority, and all of its functions are derived from the Supreme Court of Tennessee. As such, the Board of Professional Responsibility is an agent of the Supreme Court. The Supreme Court has jurisdiction to review the actions of the Board. This jurisdiction is grounded in the Court's inherent power to review the actions of its boards, commissions, and other agencies. Despite the broad powers granted to the Board under Rule 9, they are not without limit. For instance, the Board does not have the power to hold an individual in contempt. Indeed, only the courts of Tennessee have inherent authority to order punishment for acts of contempt. However, courts may only punish as contemptuous the types of acts described in *Tenn. Code Ann. § 29-9-102*.

Civil Procedure > Sanctions > Contempt > General Overview
Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Contempt > General Overview
[HN16] See *Tenn. Code Ann. § 29-9-102*.

Civil Procedure > Sanctions > Contempt > General Overview
Governments > Courts > Rule Application & Interpretation
Legal Ethics > Sanctions > Disciplinary Proceedings > Investigations
[HN17] The plain language of *Tenn. Code Ann. § 29-9-102(3)* states that the willful disobedience of a lawful rule of a court of Tennessee may be considered a contemptuous act. In that respect, the language of Tenn. Sup. Ct. R. 9, § 13.2 is instructive. This provision states that a violation of the confidentiality requirement is regarded as contempt of the Supreme Court of Tennessee.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Contempt > General Overview
Legal Ethics > Professional Conduct > Nonlawyers
Legal Ethics > Sanctions > Disciplinary Proceedings > Investigations
[HN18] Any person, including a non-lawyer, who violates the confidentiality mandate embodied in Tenn. Sup. Ct. R. 9, § 25 may be charged with contempt.

Civil Procedure > Sanctions > Contempt > Civil Contempt
Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Contempt > Penalties
[HN19] A contempt may either be civil or criminal in nature. Civil contempt occurs when a person does not comply with a court order and an action is brought by a private party to enforce rights under the order that has been violated. Punishment for civil contempt is designed to coerce compliance with the court's order and is imposed at the insistence and for the benefit of the private party who has suffered a violation of rights. Also, in civil contempt cases, the quantum of proof necessary to convict is a preponderance of the evidence. On the other hand, criminal contempts are intended to preserve the power and vindicate the dignity and authority of the law, and the court as an organ of society. Punishment for criminal contempt is both punitive and unconditional in nature and serves to adjudicate an issue between the public and the accused. In criminal contempt proceedings, the defendant is presumed to be innocent and must be proven guilty beyond a reasonable doubt.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Contempt > General Overview
Governments > Courts > Rule Application & Interpretation
Legal Ethics > Sanctions > Disciplinary Proceedings > Investigations
[HN20] A charge of contempt arising from a violation of Tenn. Sup. Ct. R. 9, § 25 is criminal in nature and may be brought by the complainant or respondent whose rights of confidentiality have been violated. Additionally,

the Supreme Court of Tennessee, or its agent the Board of Professional Responsibility of the Supreme Court of Tennessee, may bring an action for contempt to vindicate the dignity and authority of the Supreme Court, its rules, and orders.

Governments > Courts > Authority to Adjudicate
[HN21] The Supreme Court of Tennessee is not a fact finder and does not assess the credibility of the testimony or weight of the evidence. This responsibility rests with the trial courts of Tennessee and the juries empowered thereunder.

Civil Procedure > Sanctions > Contempt > General Overview
Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Contempt > General Overview
Governments > Courts > Authority to Adjudicate
[HN22] The general contempt statute does not deal with the question of whether a court may punish contempts of another court's order. As a general rule, the power to punish for contempt is reserved to the court against which the contempt is committed, i.e. the court whose order is disobeyed. Thus, one tribunal may not punish for contempt of another. Additionally, a contempt proceeding is sui generis and is considered incidental to the case out of which it arises, and often stems from an underlying proceeding that is not complete.

Civil Procedure > Judicial Officers > References
Legal Ethics > Sanctions > General Overview
Trade Secrets Law > Misappropriation Actions > Elements > Confidentiality
[HN23] The formal charge of contempt against a person in violation of Tenn. Sup. Ct. R. 9, § 25 shall be filed in the Supreme Court of Tennessee. Upon receipt, the Supreme Court shall appoint a special master who shall conduct an evidentiary hearing, make findings of fact, and return the record and its findings to the Supreme Court. Upon review, the Supreme Court shall make a determination as to whether a contemptuous act has been committed and what, if any, punishment will follow.

COUNSEL: Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; Michael W. Catalano, Associate Solicitor General, for the petitioner, Board of Professional Responsibility of the State of Tennessee.

Ronald D. Krelstein, Germantown, Tennessee, for the respondent, Richard Roe, et al.

JUDGES: WILLIAM M. BARKER, J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, C.J., AND E. RILEY ANDERSON, JANICE M. HOLDER, JJ, AND BEN H. CANTRELL, SP.J. joined.

OPINION BY: WILLIAM M. BARKER

OPINION

[*468] Pursuant to Tennessee Supreme Court Rule 23, we accepted certification of questions of law from the United States District Court for the Western District of Tennessee. We are asked by the federal district court to **construe** Rule 9, section 25 of the **Rules of the Supreme Court** of Tennessee. Specifically, we are asked to determine whether Richard Roe, a layperson (i.e., a non-attorney), may be charged with contempt for disclosing that he filed a complaint with the Tennessee Board of Professional Responsibility against an attorney [**2] in violation of the confidentiality provision embodied in Rule 9, section 25, and if so, by whom and before what tribunal? For the reasons given herein, we answer that the confidentiality requirement of Rule 9, section 25 applies to non-lawyers and lawyers alike. The appropriate sanction for a violation of Rule 9, section 25 is an action of contempt. Contempt proceedings may be initiated by the attorney against whom the complaint has been filed, the complainant, the Board of Professional Responsibility, or this Court. Finally, we hold that such a petition for contempt should be filed in this Court, whereupon assignment shall issue to a special master to conduct an evidentiary hearing. The record and findings of fact of the special master shall then be sent to this Court whereupon a determination of guilt and punishment, if any, will follow.

FACTUAL BACKGROUND FACTS

This case presents an issue of first impression in Tennessee, requiring this Court to construe Rule 9, section 25 of the Rules of the Tennessee Supreme Court. The action giving rise to this Rule 23 certified question began when Richard Roe, a layperson residing in Tennessee, and another individual filed an action [**3] for declaratory judgment and injunctive relief in the United States District Court for the Western District of Tennessee. [1] The named defendants are the Board of Professional Responsibility (the "Board") and individual Board members in their official capacities. In that suit, Roe asserts that section 25 of Rule 9 of the Tennessee Supreme Court is an unconstitutional prior restraint of his freedom of speech and expression guaranteed by the *First* and *Fourteenth Amendments of the United States Constitution* and *Article I, section 19 of the Tennessee Constitution*[HN1]. *Section 25* of Rule 9 requires that all proceedings involving allegations of misconduct by an attorney be kept confidential, and that all participants in

the proceeding conduct themselves so as to maintain the confidentiality of the proceeding. The Board has filed a motion to dismiss the federal complaint [*469] stating that the respondent lacks standing to bring suit. The district court deferred ruling on the Board's motion to dismiss until this Court responded to the order for certification.

1 The claims of the other individual, John Doe, an attorney, were dismissed by the district court without prejudice, and John Doe is not a party to this Rule 23 proceeding.

[**4] The underlying facts giving rise to Roe's declaratory judgment action are as follows: Roe, who is not an attorney, filed a complaint with the Board of Professional Responsibility against an attorney. Roe desires to speak or write publicly about his complaint and the manner in which the Board investigates such complaints. Roe contends, however, that to do so would violate section 25 of Rule 9 and expose him to the risk of being cited for contempt.

The district court determined that the issue presented a novel question under Tennessee law and that certification was warranted. The Rule 23 certification order filed in this Court asks us to decide whether Richard Roe, a layperson (i.e., a non-attorney), may be charged with contempt for disclosing that he filed a complaint with the Tennessee Board of Professional Responsibility against an attorney in violation of Rule 9, section 25, and if so, by whom and before what tribunal? We accepted the certification of these questions.

STANDARD OF REVIEW

In construing Rule 9 of the Rules of the Tennessee Supreme Court, we are confronted [**5] with an issue of first impression. [HN2] There are well-established and well-known rules of construction which we apply when interpreting statutes enacted by legislative bodies. In addition, we have also applied "these general rules of statutory construction to rules and regulations drafted by administrative agencies pursuant to a legislative delegation of power." *Houghton v. Aramark Educ. Res., Inc., 90 S.W.3d 676, 679 (Tenn. 2002)* (citing *Consumer Advocate Div. v. Greer, 967 S.W.2d 759, 762 (Tenn. 1998))*. Importantly, however, the rule at issue in this case was not drafted by a legislative body or administrative agency. It was drafted by this Court. Upon due consideration, we conclude that [HN3] it is prudent for this Court to likewise apply the traditional rules of statutory construction to Rule 9 of the Rules of the Tennessee Supreme Court. Accordingly, [HN4] this Court's role in statutory construction is to ascertain and "give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." *Aramark, 90 S.W.3d at 678* (quoting *Owens v. State, 908 S.W.2d 923, 926 (Tenn. 1995))*; [**6] see also *State v. Flemming, 19 S.W.3d 195, 197 (Tenn. 2000)*; *State v. Butler, 980 S.W.2d 359, 362 (Tenn. 1998)*. We determine intent "from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning." *Flemming, 19 S.W.3d at 197* (citing *Butler, 980 S.W.2d at 362*). Moreover, we have consistently held that "in construing a statute, all sections are to be construed together in light of the general purpose and plan." *State v. Netto, 486 S.W.2d 725, 729 (Tenn. 1972)*. Furthermore, the rules of statutory construction direct us not to "apply a particular interpretation to a statute if that interpretation would yield an absurd result." *State v. Sims, 45 S.W.3d 1, 11 (Tenn. 2001)* (quoting *Flemming, 19 S.W.3d at 197*).

DISCUSSION

The fundamental question in this case is one of personal jurisdiction. [HN5] Because we are the court of last resort in this State, we possess the "'inherent supervisory power to regulate the practice of law'" in [**7] Tennessee. *Brown v. Bd. of Prof'l Responsibility, 29 S.W.3d 445, 449 (Tenn. 2000)* (quoting *In re Burson, 909 S.W.2d 768, 773* [*470] *(Tenn. 1995))*. In furtherance of our duty to regulate the practice of law in Tennessee, we issue licenses to those whom we deem qualified to engage in the practice of law, and, when appropriate, discipline attorneys who violate the rules governing the legal profession. It is, therefore, beyond dispute that [HN6] all licensed attorneys within Tennessee are subject to the jurisdiction of this Court, and its agent, the Board of Professional Responsibility. The Board is charged under Rule 9 with investigating any alleged ground for discipline or alleged incapacity of any attorney, and to take appropriate action to effectuate the purposes of the disciplinary rules. However, in this case, we are confronted with a layperson complainant alleging attorney misconduct. The question thus becomes whether or not, and to what extent, a layperson complainant is or may become subject to the jurisdiction of the Board, and ultimately this Court.

Rule 9 Section 25 of the Rules of the Tennessee Supreme Court [HN7] The Board is charged under [**8] Rule 9 with investigating attorney misconduct and disciplining, or requesting discipline by this Court for, attorneys found to have violated standards of professional conduct. One principal feature of the Board's authority when conducting investigations is that the information and charges are to remain confidential pursuant to section 25 of Rule 9. Section 25 provides in part that:

[HN8] *all proceedings involving allegations of misconduct by or the disability of an attorney*, including all information, records, minutes, files or other documents of the Board, Hearing Committee Members and Disciplinary Counsel are deemed to be non-public records. All such information, records, minutes, files or other documents shall be kept confidential and privileged until and unless: (a) a recommendation for the imposition of public discipline is filed with the Supreme Court by the Board; or (b) the respondent-attorney requests that the matter be public; or (c) the investigation is predicated upon conviction of the respondent-attorney for a crime; or (d) in matters involving alleged disability, this Court enters an order transferring the respondent-attorney to disability inactive status pursuant [**9] to Section 21. In those disciplinary proceedings in which judicial review is sought pursuant to Section 1.3, the records and hearing in the Circuit or Chancery Court and in this Court shall be public to the same extent as other cases. *All participants in the proceeding shall conduct themselves so as to maintain the confidentiality of the proceeding.*

(emphasis added).

Personal Jurisdiction Over a Layperson Complainant

In the federal declaratory judgment action, the State argues that Roe, the plaintiff therein, lacks standing to maintain that suit. The State maintains that although Roe has filed a complaint alleging attorney misconduct with the Board of Professional Responsibility, he does not become a "participant in a proceeding," and thus subject to the jurisdiction of the Board, until such time as a "formal proceeding" may commence. Thus, despite the fact that a complaint has been filed, the Board contends that there is no "proceeding" until an investigation regarding the merits of the complaint has been completed and "formal disciplinary proceedings" commence.

Conversely, Roe argues that by filing a complaint alleging attorney misconduct in accordance [**10] with the procedural guidelines of Rule 9, he voluntarily subjected himself to the jurisdiction of the [*471] Board and this Court. Roe makes no distinction between the filing of a complaint with the Board and the filing of a complaint with a court of law in this State. We agree with Roe. [HN9] When an individual seeks affirmative relief from a tribunal, or acts in a manner inconsistent with the claim of absence of jurisdiction, he is said to consent to the jurisdiction of that tribunal. See *Tenn. Dep't. of Human Servs. v. Daniel, 659 S.W.2d 625, 626 (Tenn. Ct. App. 1983)*. Accordingly, we hold that the Board obtained personal jurisdiction over Roe when he filed his complaint alleging attorney misconduct. At that point the Board obtained authority to require Roe, the layperson, to comply with all requirements of Rule 9 of the Rules of the Tennessee Supreme Court.

Contempt For Violating Section 25 of Rule 9

Having concluded that Roe became subject to the personal jurisdiction of the Board by filing a complaint alleging attorney misconduct, we must next determine if he is now in jeopardy of being held in contempt if he violates the confidentiality requirement of [**11] section 25 of Rule 9.

It is fundamental that [HN10] one may not be held in contempt unless he or she violates a specific order of a tribunal properly having jurisdiction of that person. See *Daniel, 659 S.W.2d at 626*; *Branch v. Branch, 35 Tenn. App. 552, 249 S.W.2d 581, 582 (Tenn. Ct. App. 1952)*. Roe argues that he is in jeopardy of being held in contempt if he violates the confidentiality requirement of section 25 because he believes it to be a standing order of this Court, the violation of which is a contemptuous offense. On the other hand, the Board maintains that section 25 is merely a rule, not a specific order, the violation of which does not subject one to a contempt proceeding. The Board contends that Roe may only be in jeopardy of contempt should the investigation of the facts surrounding his complaint of attorney misconduct result in the initiation of a "formal proceeding" pursuant to section 8 of Rule 9. Section 8 provides in relevant part that:

[HN11] all investigations, whether upon complaint or otherwise, shall be initiated by the Board, acting through its Chair or Vice-Chair, and conducted by Disciplinary Counsel. Upon the conclusion of an investigation, [**12] Disciplinary Counsel may recommend dismissal, informal admonition of the attorney concerned or a private reprimand, public censure or prosecution of formal charges before a hearing committee. . . . If the recommended disposition is private reprimand, public censure, or prosecution of formal charges before a hearing committee, the Board shall review the recommendation and approve or modify it. The Board may determine whether a matter should be concluded by dismissal, or informal admonition; may recommend a private reprimand or public censure; or, direct that a *formal proceeding* be instituted before a hearing committee in the appropriate Disciplinary District and assign it to a hearing committee for that purpose.

(Emphasis added). *Section 8.2 of Rule 9* further states that [HN12] "*formal disciplinary proceedings* before a hearing committee shall be instituted by Disciplinary Counsel by filing with the Board a petition which shall be sufficiently clear and specific to inform the respondent of the alleged misconduct." (Emphasis added).

The Board correctly maintains that [HN13] if a formal proceeding as described in section 8 commences, it

is authorized under *section 13.1 of Rule 9* to obtain [**13] subpoenas from [*472] the circuit or chancery courts of this state. [2] Subpoenas issued in connection with a confidential investigation compel the appearance of witnesses to give evidence in such formal proceedings. The Board takes the position that until a subpoena has issued to Roe, he is under no order from the Board or a court, and may not be held in contempt for any breach of confidentiality. Thus, despite the plain wording of section 25, mandating confidentiality in "*all* proceedings," the Board would have us hold that the confidentiality requirement applies only in practicable and enforceable terms to *formal* proceedings. We reject such an interpretation.

> 2 Specifically, *section 13.1 of Rule 9* grants the hearing committee and/or the Disciplinary Counsel of the Board the authority to "obtain from the circuit or chancery court having jurisdiction, subpoenas to compel the attendance of witnesses . . ."

We find section 25 of Rule 9 to be unambiguous. [HN14] The essence of the Rule mandates that until one of [**14] the enumerated events occur: (1) all proceedings surrounding allegations of misconduct by an attorney be "kept confidential," and (2) "all participants in the proceeding shall conduct themselves so as to maintain the confidentiality of the proceeding." To accept the Board's argument would eviscerate the reasons underlying confidentiality. The purposes underlying confidentiality are obvious. Foremost, the rule serves to protect both the complainant from possible recriminations and the attorney from unsubstantiated charges while a thorough investigation is conducted. Moreover, removing or unnecessarily qualifying the confidentiality requirement would eliminate many sources of information and reduce complaints received by the Board from lay citizens, litigants, lawyers, and judges. Finally, the rule serves to protect public confidence in the judicial system by preventing disclosure of a charge until the directives of section 25 are satisfied.

Under the Board's interpretation of the Rule, layperson complainants could violate section 25 with impunity, and would be subject to punishment for violations only in the event that confidentiality were violated after a formal proceeding commenced. [**15] In a manner of speaking, the horse would be out of the barn well after the barn door is required to be shut. Clearly, Rule 9, when viewed in its entirety, was never intended to lead to such a result. Accordingly, we hold that Roe became a "participant in a proceeding," thus subject to the personal jurisdiction of the Board, upon the filing of his complaint alleging attorney misconduct. Moreover, should Roe violate the confidentiality requirement of section 25 of Rule 9, which we consider a standing order of this Court, he is in jeopardy of being found in contempt.

The Procedure and Forum For Contempt Proceedings

The second and third portions of the certified question from the district court ask us to determine who may bring an action for contempt, and the appropriate tribunal wherein an action of contempt for a violation of Rule 9, section 25 may be heard. We begin by setting forth the relationship between the Board and this Court. [HN15] Rule 9 of the Rules of the Supreme Court, among other things, established the Board of Professional Responsibility. The Board, its authority, and all of its functions are derived from the Supreme Court. *Fletcher v. Board of Professional Responsibility, 915 S.W.2d 448, 450 (Tenn. Ct. App. 1995).* [**16] As such, the Board of Professional Responsibility is an agent of the Supreme Court. *In re Youngblood, 895 S.W.2d 322, 325 (Tenn. 1995).* The Supreme Court has jurisdiction to review the actions of the Board. Id. This jurisdiction [*473] is "grounded in the Court's inherent power to review the actions of its boards, commissions, and other agencies." Id. Despite the broad powers granted to the Board under Rule 9, they are not without limit. For instance, the Board does not have the power to hold an individual in contempt. Indeed, only "the courts of Tennessee have inherent authority to order punishment for acts of contempt." *Reed v. Hamilton, 39 S.W.3d 115, 117 (Tenn. Ct. App. 2000)* (perm. app. denied February 12, 2001) (citing *Black v. Blount, 938 S.W.2d 394, 397 (Tenn. 1996); Thigpen v. Thigpen, 874 S.W.2d 51, 53 (Tenn. Ct. App. 1993)).* However, courts may only punish as contemptuous the types of acts described in *Tennessee Code Annotated section 29-9-102.* See *Black, 938 S.W.2d at 397-98; State v. Turner, 914 S.W.2d 951, 955 (Tenn. Crim. App. 1995).* [**17] *Section 29-9-102* provides:

> [HN16] the *power of the several courts* to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases: (1) The willful misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice; (2) The willful misbehavior of any of the officers of such courts, in their official transactions; (3) The *willful disobedience* or resistence of any officer of the [sic] such courts, party, juror, witness, *or any other person, to any lawful writ, process, order, rule, decree, or command of such courts*; (4) Abuse of, or unlawful interference with, the process or proceedings of the court; (5) Willfully conversing with jurors in relation to the merits of the cause in the trial of which they are engaged, or otherwise tampering with them; or (6) Any other act or omission declared a contempt by law.

(Emphasis added).

[HN17] The plain language of *section 29-9-102(3)* states that the willful disobedience of a lawful rule of a court of this State may be considered a contemptuous act. In that respect, the language of Rule 9, section 13.2 is instructive. This [**18] provision states that a violation of the confidentiality requirement *"is regarded as contempt of the Supreme Court."* (Emphasis added). The foregoing provisions are unambiguous. [HN18] Any person, including a non-lawyer such as the respondent, who violates the confidentiality mandate embodied in section 25 of Rule 9 may be charged with contempt. To hold otherwise would undermine the confidentiality of the proceedings and invite willful disregard of this Court's inherent authority to regulate the practice of law.

Having determined that an action for contempt is the appropriate sanction for a violation of Rule 9, section 25, we necessarily distinguish between civil and criminal contempt in order to definitively state who may bring such an action. We have on numerous occasions stated that [HN19] a contempt may either be civil or criminal in nature. See *Wilson v. Wilson, 984 S.W.2d 898, 906 (Tenn. 1998)* (Birch, J., dissenting); *Black, 938 S.W.2d at 398-401*; *Turner, 914 S.W.2d at 954*. Civil contempt occurs when a person does not comply with a court order and an action is brought by a private party to enforce rights under the order that has been [**19] violated. See *Black, 938 S.W.2d at 398*; *Robinson v. Air Draulics Eng'g Co., 214 Tenn. 30, 377 S.W.2d 908, 912 (Tenn. 1964)*; *Turner, 914 S.W.2d at 995*. Punishment for civil contempt is designed to coerce compliance with the court's order and is imposed at the insistence and for the benefit of the private party who has suffered a violation of rights. See *Black, 938 S.W.2d at 398*; *Turner 914 S.W.2d at 955*; *Sherrod v. Wix, 849 S.W.2d 780, 786 n.4 (Tenn. Ct.* [*474] *App. 1992)*. Also, in civil contempt cases, the quantum of proof necessary to convict is a preponderance of the evidence. On the other hand, criminal contempts are "intended to preserve the power and vindicate the dignity and authority of the law, and the court as an organ of society." *Black, 938 S.W.2d at 398*. Punishment for criminal contempt is both punitive and unconditional in nature and serves to adjudicate "an issue between the public and the accused." Id. In criminal contempt proceedings, the defendant is presumed to be innocent and must be proven guilty beyond a reasonable doubt. See *Shiflet v. State, 217 Tenn. 690, 400 S.W.2d 542, 543 (Tenn. 1966)*. [**20]

Therefore, in accord with well-established case law of this State, we hold that [HN20] a charge of contempt arising from a violation of Rule 9, section 25 is criminal in nature and may be brought by the complainant or respondent whose rights of confidentiality have been violated. Additionally, the Supreme Court of Tennessee, or its agent the Board, may bring an action for contempt to vindicate "the dignity and authority" of the Supreme Court, our rules, and orders.

Finally, we address the appropriate forum wherein an action for contempt may be brought. At the outset, it is necessary to reiterate that [HN21] "we are not fact finders and do not assess the credibility of the testimony or weight of the evidence." *State v. Flake, 88 S.W.3d 540, 553 (Tenn. 2002)*. This responsibility rests with the trial courts of this State and the juries empowered thereunder. However, as the Court of Appeals stated in *State v. Gray, 46 S.W.3d 749, 750 (Tenn. Ct. App. 2000)* (perm. app. denied April 16, 2001), [HN22] the general contempt statute does not "deal with the question of whether a court may punish contempts of another court's order." As a general rule, "the power to punish for contempt [**21] is reserved to the court against which the contempt is committed, i.e. the court whose order is disobeyed." *Gray, 46 S.W.3d at 750* (citing *Chaffin v. Robinson, 187 Tenn. 125, 213 S.W.2d 32 (Tenn. 1948))*. Thus, "one tribunal may not punish for contempt of another," *Chaffin, 213 S.W.2d at 32*. Additionally, a contempt proceeding is sui generis and is considered incidental to the case out of which it arises, and often stems from an underlying proceeding that is not complete. See *Bowdon v. Bowdon, 198 Tenn. 143, 278 S.W.2d 670, 672 (Tenn. 1955)*; *Graham v. Williamson, 128 Tenn. 720, 164 S.W. 781, 782 (Tenn. 1914)*; *Hall v. Hall, 772 S.W.2d 432, 435-36 (Tenn. Ct. App. 1989)*.

In light of the foregoing principles, we hold that [HN23] the formal charge of contempt against a person in violation of Rule 9, section 25 shall be filed in this Court. Upon receipt, this Court shall appoint a special master who shall conduct an evidentiary hearing, make findings of fact, and return the record and its findings to this Court. Upon review, this Court shall make a determination as to whether a contemptuous act [**22] has been committed and what, if any, punishment will follow.

CONCLUSION

The confidentiality requirement embodied in Rule 9, section 25 of the Rules of the Supreme Court of Tennessee applies to a layperson, such as the respondent, who files a complaint against an attorney with the Board. An appropriate sanction for a violation of section 25 is an action for contempt. An action for contempt may be initiated by any person whose rights under Rule 9, section 25 have been violated. Additionally, the Supreme Court, or its agency the Board of Professional Responsibility, may pursue an action for contempt in order to vindicate the authority of its rules and orders. Finally, we hold that a charge of contempt is to be filed first with this [*475] Court whereupon assignment shall issue to special mas-

ter to make findings of fact. Thereafter, the record shall be returned to this Court, and we shall make a determination as to whether a contemptuous act has been committed and what, if any, punishment will follow.

Costs in this Court are assessed against the appellant, the Board of Professional Responsibility.

WILLIAM M. BARKER, JUSTICE

LEXSEE 29 S.W.3D 445, 449

ROBERT L. BROWN v. BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE

No. E1999-02636-SC-R3-CV

SUPREME COURT OF TENNESSEE, EASTERN SECTION, AT KNOXVILLE

29 S.W.3d 445; *2000 Tenn. LEXIS 223*

May 2, 2000, Decided

SUBSEQUENT HISTORY: [**1] As Corrected June 12, 2000.

PRIOR HISTORY: Direct Appeal from the Chancery Court for Hamilton County. Howell N. Peoples, Chancellor. No. 98-1215.

DISPOSITION: Order of the Board of Professional Responsibility Vacated and Remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Respondent attorney sought review of the judgment of the Chancery Court for Hamilton County, Tennessee, dismissing his writ of certiorari to review the decision of appellee Board of Professional Responsibility assessing costs incurred as a result of formal disciplinary proceedings.

OVERVIEW: Respondent was assessed costs incurred as a result of formal disciplinary proceedings. Appellee contended that even if respondent had the right to Supreme Court review of its decision regarding costs, he waived it. The court found appellee's contentions without support. Respondent raised the costs issue in his appeal of the hearing panel's judgment to the circuit court. There was no support contending that respondent waived the right to appeal the costs. Respondent did not have the option to seek reduction of the assessed costs by appealing the underlying sanction.

OUTCOME: The order was vacated and remanded; respondent raised costs issue in his appeal of the hearing panel's judgment, there was no support contending that respondent waived the right to appeal the costs.

LexisNexis(R) Headnotes

Legal Ethics > Sanctions > Disciplinary Proceedings > Hearings

[HN1] Tenn. Sup. Ct. R. 9, § 24, essentially requires the Board of Professional Responsibility (Board) to assess against a respondent attorney upon whom sanctions are imposed all costs incurred as a result of formal disciplinary proceedings.

Governments > Courts > Rule Application & Interpretation

Legal Ethics > Sanctions > Disciplinary Proceedings > Hearings

[HN2] Tenn. Sup. Ct. R. 9, § 24.3 authorizes the Board of Professional Responsibility to grant appropriate relief from the cost assessment.

Legal Ethics > Practice Qualifications

[HN3] It is well settled and indisputable that the Supreme Court has the inherent supervisory power to regulate the practice of law. In exercise of that power, the Supreme Court has promulgated Rule 9, Rules of the Supreme Court, which addresses the discipline of lawyers and the enforcement thereof.

Civil Procedure > Judgments > General Overview

Governments > Courts > Rule Application & Interpretation

Legal Ethics > Sanctions > Disciplinary Proceedings > Hearings

[HN4] In Tenn. Sup. Ct. R. 9, § 1.3, the Supreme Court has specifically designated the extent to which the right to review a judgment provided in *Tenn. Code Ann. § 27-9-101* is to be applied in the disciplinary context. Tenn. Sup. Ct. R. 9, § 1.3 provides only that the respondent or

EXHIBIT
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I

the Board may have a review of the judgment of a hearing committee in the manner provided by Tenn. Code Ann. § 27-901 et seq. Tenn. Sup. Ct. R. 9, § 1.3. Thus, application of *Tenn. Code Ann. § 27-9-101* in the disciplinary context is limited to chancery court review of the judgment of a hearing panel.

Administrative Law > Agency Adjudication > Decisions > General Overview
Governments > Courts > Rule Application & Interpretation
Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals
[HN5] The Board of Professional Responsibility (Board), its authority, and all of its functions are derived from the Supreme Court. As such, the remainder of the judiciary are powerless to review action or inaction of the Board or its employees except as expressly authorized by the Supreme Court. A lower court is only authorized to review a hearing committee's decision pursuant to Tenn. Sup. Ct. R. 9, § 1.3. Lower courts have not been granted the authority to review the Board's decision to assess the costs of the proceedings under Tenn. Sup. Ct. R. 9, § 24.3. Therefore, a trial court lacks authority to review the Board's decision regarding costs.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue
Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals
[HN6] Even though Board of Professional Responsibility (Board) decisions are not reviewable by the trial court, such decisions are, indeed, reviewable. The Board of Professional Responsibility is an agency of the Supreme Court. As such, the Supreme Court has jurisdiction to review the actions of the Board. This jurisdiction is grounded in the Court's inherent power to review the actions of its boards, commissions, and other agencies. Under this inherent power, this Court has the exclusive authority to review the Board's assessment of costs under Tenn. Sup. Ct. R. 9, § 24.3.

Civil Procedure > Appeals > Reviewability > Time Limitations
Governments > Legislation > Statutes of Limitations > Time Limitations
Legal Ethics > Sanctions > Disciplinary Proceedings > Appeals
[HN7] Under Tenn. Sup. Ct. R. 9, § 1.3, an attorney may appeal the decree of a circuit or chancery court directly to this Court. Notice of this appeal is governed by Tenn. R. App. P. 4(a), which requires a party to file his or her appeal within 30 days after the trial court entered judgment.

COUNSEL: Shelby R. Grubbs, Chattanooga, Tennessee, and William P. Eiselstein, Chattanooga, Tennessee, for the petitioner/appellant, Robert L. Brown.

Laura L. Chastain, Nashville, Tennessee, for the defendant/appellee, Board of Professional Responsibility of the Supreme Court of Tennessee.

JUDGES: BIRCH, J., delivered the opinion of the court, in which ANDERSON, C.J., DROWOTA, BARKER, JJ., and BYERS, S.J., joined.

OPINION BY: BIRCH

OPINION

[*446] This appeal arises from the refusal of the Board of Professional Responsibility to reduce the costs it assessed against an attorney pursuant to formal disciplinary proceedings. After having been assessed costs under Rule 9, § 24.3, Rules of the Supreme Court, Robert L. Brown, the respondent attorney, tendered the full amount of the assessed costs together with a petition for their reduction to the Board of Professional Responsibility. The Board denied the petition. Brown then filed a petition for the writ of certiorari in the chancery court to review the decision of the Board. Finding that it lacked jurisdiction, the chancery court dismissed Brown's petition. Brown then appealed to the Court of Appeals. The Court of Appeals [*447] transferred the cause to this Court under Rule 17, Rules of Appellate Procedure. We accepted transfer to determine whether the Board's denial of relief from costs is reviewable, and if so, by whom. We hold that the Supreme Court has the inherent and exclusive jurisdiction to review [**2] judgments of the Board. Here, however, because the Board has failed to provide a reviewable record, we must vacate the Board's order denying Brown relief from the assessed costs. The cause is remanded to the Board for proceedings consistent with the amendment to Rule 9, § 24.3, Rules of the Supreme Court, amended April 28, 2000, and attached as an appendix to this opinion.

I

[HN1] Rule 9, § 24.3, [1] Rules of the Supreme Court, essentially requires the Board of Professional Responsibility (Board) to assess against a respondent attorney upon whom sanctions are imposed all costs incurred as a result of formal disciplinary proceedings. Following such proceedings, and in accordance with the Rule, the Board assessed costs against Robert L. Brown, the respondent attorney [**3] in the case at bar, in the amount of $ 13,476.79.

1 Reimbursement of Costs. In the event that a judgment of disbarment, suspension, public censure, private reprimand, temporary suspension, disability inactive status, reinstatement or denial of reinstatement results from formal proceedings, the Board shall assess against the respondent attorney the costs of the proceedings, including court reporters expenses for appearances and transcription of all hearings and depositions, the expenses of the hearing committee in the hearing of the cause and the hourly charge of disciplinary counsel in investigating and prosecuting the matter. The Board may for good cause grant appropriate relief to the respondent attorney in assessing such costs.

The hourly charges of disciplinary counsel, on formal proceedings filed subsequent to this amendment, shall be assessed at $ 30.00 per hour for investigative time incurred prior to the filing of formal proceedings; and $ 80.00 per hour in connection with formal proceedings.

The hourly charges of disciplinary counsel, on formal proceedings filed prior to this amendment, shall be assessed at $ 20.00 per hour for investigative time; and $ 30.00 per hour for trial time.

Payment of the costs assessed by the Board pursuant to this rule shall be required as a condition precedent to reinstatement of the respondent attorney.

[**4] [HN2]

Additionally, Rule 9, § 24.3 authorizes the Board to grant appropriate relief from the cost assessment. Accordingly, on July 10, 1998, Brown tendered to the Board the full amount of the assessed costs together with a petition for their reduction. By order entered September 17, 1998, the Board denied the petition. Brown then filed a petition for the writ of certiorari in the chancery court pursuant to *Tenn. Code Ann. § 27-9-101* [2] to review the decision of the Board denying him relief from costs. Finding that it lacked jurisdiction, the chancery court dismissed Brown's petition. Brown appealed to the Court of Appeals. The Court of Appeals, reasoning that appeals of disciplinary matters should properly be before the Supreme Court, transferred the cause to this Court as provided in Rule 17, Rules of Appellate Procedure. [3]

2 Anyone who may be aggrieved by any final order or judgment of any board or commission functioning under the laws of this state may have said order or judgment reviewed by the courts, where not otherwise specifically provided, in the manner provided by this chapter.

3 If a case is appealed to the Supreme Court, Court of Appeals, or Court of Criminal Appeals that should have been appealed to another court, the case shall be transferred to the proper court.

[**5] We accepted transfer to determine whether the Board's denial of relief from costs is reviewable and, if so, by whom. After full and careful consideration of the record and the authorities, we hold that the Supreme Court has the inherent and exclusive jurisdiction to review judgments of the Board. Here, however, because the Board has failed to provide a reviewable record, we must vacate the Board's order denying relief from the assessed costs. The cause is remanded to the Board for [*448] proceedings consistent with the amendment to Rule 9, § 24.3, Rules of the Supreme Court, amended April 28, 2000, attached as an appendix to this opinion.

II

The Board filed a petition for discipline against Brown alleging violations of several disciplinary rules occurring as a result of his conduct in a real estate transaction in which he was both a party and the closing attorney. The matter was referred to and considered by a Hearing Panel [4] pursuant to Rule 9, § 8.1, et seq., and the panel concluded that Brown had violated DR1-102(A)(4) [5] by engaging in misrepresentation.

4 A Hearing Panel consists of three members of the hearing committee. Tenn. S. Ct. R. 9, § 6.4.

[**6]

5 (A) A lawyer shall not:

. . .

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Brown appealed the panel's judgment to the circuit court pursuant to Rule 9, § 1.3, Rules of the Supreme Court. Adopting most of the findings of the Hearing Panel, the circuit court accepted the panel's conclusion that Brown had commingled personal funds with trust or escrow funds in violation of DR9-102(A). [6] The circuit court expressly rejected, however, the panel's conclusion that Brown had violated DR1-102(A)(4). The panel recommended public censure or reprimand as Brown's sanction; the circuit court imposed public censure. Subsequently, the Board assessed, pursuant to Rule 9, § 24.3, Rules of the Supreme Court, costs against Brown in the amount of $ 13,476.79. This assessment was included in an order of enforcement entered by this Court.

6 (A) All funds of clients paid to a lawyer or law firm, including advances for costs and expenses,

shall be deposited in one or more identifiable insured depository institutions maintained in the state in which the law office is situated.

For purposes of this rule, "insured depository institution" shall mean an institution maintaining government insured depository accounts on which withdrawals or transfers can be made on demand, subject only to such notice period which the institution is required to observe by law or regulation. No funds belonging to the lawyer or law firm shall be deposited therein except as follows . . .

[**7] Because Brown has accepted the circuit court's sanction, we recite only the facts necessary to resolve the costs issue. Thirty days after the entry of this Court's order of enforcement, Brown tendered the $ 13,476.79 and petitioned the Board for a reduction of costs. The petition included the following grounds:

1. Of the eight separate acts alleged in the petition for discipline as violations of the disciplinary rules, disciplinary counsel succeeded in proving *none* (emphasis in original);

2. Of the seven disciplinary rules Brown was alleged to have violated, the Board prevailed on only one, though on different grounds than first alleged;

3. Brown is the successful party in the litigation; and

4. Of the $ 13,476.79 assessed against Brown, almost sixty percent comprises fees to outside counsel engaged by the Board.

The Board responded to Brown's petition by entry of an order on September 17, 1998, summarily denying relief. [7]

7 In the order denying relief, the Board assessed costs at $ 13,030.80--a difference of $ 445.99 from the original assessment. The basis for this difference is not stated in the record.

[**8] On November 23, 1998, Brown filed, under the provisions of *Tenn. Code Ann. § 27-9-101, et seq.*, a petition in the chancery court seeking review of the Board's refusal to reduce the assessed costs. The circuit court, agreeing with the Board's contention that it (the court) lacked subject matter jurisdiction, dismissed the petition. Brown timely sought review in the Court of Appeals. The Court of Appeals, however, transferred the case to this Court pursuant to the provisions of Rule 17, Rules of Appellate Procedure.

[*449] III

[HN3] It is well settled and indisputable that the Supreme Court has the "inherent supervisory power to regulate the practice of law . . ." *In re Burson, 909 S.W.2d 768, 773 (Tenn. 1995)*. In exercise of that power, the Supreme Court has promulgated Rule 9, Rules of the Supreme Court, which addresses the discipline of lawyers and the enforcement thereof. [HN4] In Rule 9, § 1.3, the Supreme Court has specifically designated the extent to which the right to review a judgment provided in *Tenn. Code Ann. § 27-9-101* is to be applied in the disciplinary context. Section 1.3 provides only that "the respondent or the Board may have a review of the judgment *of a hearing* [**9] *committee* in the manner provided by T.C.A. § 27-901 et seq. . . ." Tenn. Sup. Ct. R. 9, § 1.3 (emphasis added). Thus, application of *Tenn. Code Ann. § 27-9-101* in the disciplinary context is limited to chancery court review of the judgment of a hearing panel.

Moreover, [HN5] the Board, its authority, and all of its functions are derived from the Supreme Court. *Fletcher v. Board of Professional Responsibility, 915 S.W.2d 448, 450 (Tenn. Ct. App. 1995)*. As such, "the remainder of the judiciary are powerless to review action or inaction of the Board or its employees except as expressly authorized by the Supreme Court." *Id.* A lower court is only authorized to review a hearing committee's decision pursuant to Rule 9, § 1.3, Rules of the Supreme Court. Lower courts have not been granted the authority to review the Board's decision to assess the costs of the proceedings under Rule 9, § 24.3. Therefore, a trial court lacks authority to review the Board's decision regarding costs.

[HN6] Even though Board decisions are not reviewable by the trial court, such decisions are, indeed, reviewable. The Board of Professional Responsibility is an agency of the Supreme Court. *In re Youngblood, 895 S.W.2d 322, 325 (Tenn. 1995)*. [**10] As such, the Supreme Court has jurisdiction to review the actions of the Board. *Id.* This jurisdiction is "grounded in the Court's inherent power to review the actions of its boards, commissions, and other agencies." *Id.* [8] Under this inherent power, this Court has the exclusive authority to review the Board's assessment of costs under Rule 9, § 24.3.

8 For example, in *Belmont v. Board of Law Examiners*, we reviewed the actions taken by another Court agency, the *Board of Law Examiners. 511 S.W.2d 461 (Tenn. 1974)*. We reasoned that "the petition to review the action of the Board of Law Examiners in denying petitioner's request to take the examination for the fifth time is properly before this Court . . . This Court has the inherent power to prescribe and administer rules pertaining to the licensing and admission of attorneys . . . It results, therefore, if this Court has the inherent and original power to prescribe rules, then this

Court has the original power to review the action of the Board of Law Examiners in interpreting and applying them." *Id. at 462.*

[**11] The Board insists that even if Brown had the right to Supreme Court review of the Board's decision regarding costs, he has waived it. Waiver, the Board asserts, is supported by the following: (1) the issues of sanctions and the resulting costs are inextricably bound together by Rule 9, § 24.3, and, therefore, had Brown been dissatisfied with the assessed costs, he should have appealed the entire matter; (2) even if Brown had the right to Supreme Court review, the appeal was not timely filed; and (3) Brown should have objected to the costs assessed before this Court entered the Enforcement Order.

Upon careful review of the record, we find the Board's contentions to be without support. In his appeal of the hearing panel's judgment to the circuit court, Brown raised the costs issue. Responding to Brown, the circuit court, in an order dated November 10, 1997, stated "the Motion of the petitioner as to the payment of costs in these proceedings is governed by Tennessee Supreme Court Rule 9, Section 24.3 and must be presented to the Board of Professional Responsibility."

Brown received similar instructions from Disciplinary Counsel. During the [*450] proceedings, the circuit court questioned [**12] Disciplinary Counsel about the expenses to be assessed against Brown. The following colloquy occurred:

The Court: Ms. Chastain, can you send me a schedule of time and activity setting out what your claim is going to be for costs and expenses?

Ms. Chastain: Your Honor, I can. That is not the policy of this office. I can make an exception if-

The Court: How do you handle that?

Ms. Chastain: What the usual policy is, when the Supreme Court enters its Final Orders it directs the Board to assess costs, and if I might address this matter.

The Court: Okay.

Ms. Chastain: I think that Mr. Brown is asking this Court to do something that is beyond the purview of this Court. If you look at the rule, Rule 9, Section 24.3, the Court has directed the Board of Professional Responsibility, and it says, "shall assess costs, and the Board may, for good cause, grant relief." In the situation that Mr. Brown finds himself, he may apply to the Board for relief and if he can show good cause to the Board, the Board, which is separate and apart from the Office of Disciplinary Counsel, in certain instances has granted relief, but Mr. Brown is asking this Court to preempt the directive of the Supreme Court [**13] to the Board when it tells the Board to assess these costs.

Thus, Brown's appeal to the Board concerning the assessed costs was in accordance with the order of the circuit court and the directions from Disciplinary Counsel. Therefore, from the record before us, we are unable to find any support for the Board's contention that Brown waived the right to appeal the costs.

Furthermore, even if Brown should have appealed the sanction as a method of contesting the assessed costs, the Board's delay in providing him with the precise bill of costs effectively prevented exercise of this "option." [HN7] Under Rule 9, § 1.3, an attorney may appeal the decree of a circuit or chancery court directly to this Court. Notice of this appeal is governed by Rule 4(a), Rules of Appellate Procedure, which requires a party to file his or her appeal within 30 days after the trial court entered judgment. In this case, the circuit court's order was entered on November 10, 1997. Brown did not receive an itemized bill of costs until May 26, 1998, more than six months after the circuit court entered judgment. By the time he learned of the amount of costs, the time for filing a notice of appeal under Rule 4(a), [**14] Rules of Appellate Procedure, had long expired. Therefore, Brown did not have the option to seek reduction of the assessed costs by appealing the underlying sanction. Accordingly, Brown has not waived the right to Supreme Court review of the Board's decision regarding costs.

IV

Because the Board has not furnished this Court with a reviewable record, we must vacate the Board's order denying Brown relief from the assessed costs. The cause is remanded to the Board for proceedings consistent with this opinion and the amendment to Rule 9, § 24.3, Rules of the Supreme Court, amended April 28, 2000, attached as an appendix to this opinion. Additionally, subsequent appeals from assessed costs shall be governed by Rule 9, § 24.3 as amended.

Costs of this appeal are assessed to the Board of Professional Responsibility.

APPENDIX

IN THE SUPREME COURT OF TENNESSEE

IN RE: AMENDMENT TO RULE 9, § 24.3

RULES OF THE SUPREME COURT OF TENNESSEE

ORDER

Rule 9, § 24.3, Rules of the Supreme Court, governing disciplinary enforcement, [*451] amended April 28, 2000, is hereby vacated and replaced with the following:

In the event that a judgment of disbarment, suspension, public censure, [**15] private reprimand, temporary suspension, disability inactive status, reinstatement, or denial of reinstatement results from formal proceedings, the Board shall assess against the respondent attorney the costs of the proceedings, including court reporter's expenses for appearances and transcription of all hearings and depositions, the expenses of the hearing committee in the hearing of the cause, and the hourly charge of disciplinary counsel in investigating and prosecuting the matter.

The respondent attorney may petition the Board for relief from costs within thirty days of receipt of the final bill of costs or on the termination of any action upon which the disciplinary proceeding was based, whichever occurs last. In seeking relief, the respondent attorney shall have the opportunity to appear and be heard before the Board or a duly constituted panel thereof. Having conducted such a hearing, the Board shall file an order within thirty days; this order must include the basis for the Board's decision. An order reflecting the decision shall be treated as a decree of the circuit or chancery court and, as such, is appealable to the Tennessee Supreme Court under Rule 9, § 1.3, Rules of [**16] the Supreme Court.

The hourly charges of disciplinary counsel on formal proceedings filed prior to January 27, 1992, shall be assessed at $ 20 per hour for investigative time and $ 30 per hour for trial time. The hourly charges of disciplinary counsel on formal proceedings filed on or after January 27, 1992, shall be assessed at $ 30 per hour for investigative time incurred prior to the filing of formal proceedings and $ 80 per hour in connection with formal proceedings.

Payment of the costs assessed by the Board pursuant to this rule shall be required as a condition precedent to reinstatement of the respondent attorney.

PER CURIAM

3 of 37 DOCUMENTS

IN RE PETITION OF CHARLES W. BURSON, ATTORNEY GENERAL OF TENNESSEE, AND THE STATE BOARD OF EQUALIZATION FOR DETERMINATION OF WHETHER REPRESENTATION OF TAXPAYERS BY REGISTERED APPRAISERS AND OTHER NON-ATTORNEYS (CORPORATE EMPLOYEES AND CPAS) BEFORE THE STATE AND LOCAL BOARDS OF EQUALIZATION CONSTITUTES THE PRACTICE OF LAW

No. 01-S-01-9209-OT-00103

SUPREME COURT OF TENNESSEE, AT NASHVILLE

909 S.W.2d 768; 1995 Tenn. LEXIS 509

September 11, 1995, FILED

DISPOSITION: [**1] REPORT OF SPECIAL MASTER AFFIRMED AS MODIFIED.

JUDGES: RILEY ANDERSON, CHIEF JUSTICE, CONCUR: Drowota, Reid, and Birch, JJ., O'Brien, Sp.J.

OPINION BY: RILEY ANDERSON

OPINION

[*769] OPINION

ANDERSON, C.J.

The Attorney General and the State Board of Equalization have petitioned this Court for a determination of the constitutionality of *Tenn. Code Ann. § 67-5-1514* (1994), which provides that taxpayers contesting the assessment of their real and personal property before boards of equalization may be represented by non-attorney agents. Specifically, the petitioners ask that this Court determine whether the statute violates the separation of powers provisions of the Tennessee Constitution by sanctioning the unauthorized practice of law and thereby infringing upon this Court's inherent authority to regulate the practice of law.

Numerous groups affected by the legislation filed responses to the Attorney General's petition. [1] After oral argument, this Court determined that the petition could not be resolved solely on the basis of legal issues without an underlying factual foundation. As a result, we appointed Chancellor Robert S. Brandt as Special Master for the purpose of developing a factual record and [**2] making findings of fact and conclusions of law.

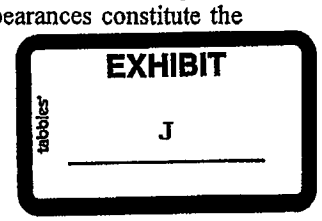
1 Groups initially responding to the petition in this Court include the following: Tennessee Taxpayers' Association, Tennessee Society of Certified Public Accountants, National Council of Property Tax Consultants, International Association of Assessing Officers, Tennessee Bar Association, Institute of Property Taxation, Nashville Bar Association, Tennessee Association of Business, and others.

After an evidentiary hearing, Chancellor Brandt filed a report with this Court, making certain findings of fact and upholding the constitutionality of the statute. Thereafter, parties participating in the hearing before the Special Master were given an opportunity to file briefs in this Court. [2] For the reasons articulated below, we adopt and affirm the Special Master's findings of fact. The Special Master's conclusions of law are affirmed as modified.

2 The law firm of Evans & Petree filed and briefed objections to the Special Master's report. The following organizations filed briefs in support of the Special Master's report: Tennessee Society of Certified Public Accountants; Tennessee Taxpayers Association; and Tennessee Association of Business.

[**3] FACTUAL BACKGROUND

In Tennessee, traditionally, appraisers and other non-attorney agents have appeared before the boards of equalization on behalf of taxpayers. In 1987, however, the Tennessee Attorney General issued two separate opinions [3] [*770] that such appearances constitute the unauthorized practice of law.



3 See Op. Tenn. Atty. Gen. No. 87-58 (April 2, 1987) and Op. Tenn. Atty. Gen. No. 87-183 (Dec. 8, 1987).

In an apparent response to those opinions, the General Assembly in 1988 enacted Public Chapter 619, which sanctioned and adopted the traditional practice of non-attorney representation. Taxpayers appearing before boards of equalization to contest the assessment or classification of property by virtue of the 1988 Act codified at *Tenn. Code Ann. § 67-5-1514* (1994), [4] are now explicitly entitled to be represented by the following non-attorney agents: (1) immediate family members, (2) officers, directors, or employees of a corporation or other artificial entity, or (3) a registered property appraiser [**4] who has satisfied certain statutory criteria. Taxpayers may also be represented by certified public accountants if the only issue on appeal is the proper completion of a schedule listing or establishing the value of tangible personal property.

4 The full text of *Tenn. Code Ann. § 67-5-1514* is attached as Appendix I to this opinion.

In addition to codifying the traditional practice of non-attorney representation, the 1988 law also establishes a regulatory mechanism which requires that non-attorney agents register with the State Board, and authorizes the Board to institute disciplinary actions.

To implement the regulatory mechanism established by the 1988 law, the State Board of Equalization promulgated rules. Thereafter, those rules were presented to the Attorney General for approval as to legality, as required by law. The Attorney General did not approve the rules, but instead, along with the State Board of Equalization, filed the petition now before us, requesting a determination of the constitutionality [**5] of *Tenn. Code Ann. § 67-5-1514* (1994). In summary, the petition explained the need for a constitutional determination as follows:

> By enacting a statute authorizing non-attorneys to participate in a representative capacity before the state and local boards of equalization, the General Assembly has implicitly determined that such representation does not constitute the practice of law. Therefore, the question instantly presented, according to the petition, is whether the General Assembly is the branch of government empowered by the Constitution and state statutes to make that determination. See *Tenn. Const., Art. II, §§ 1* and *2*; *Tenn. Const., Art. VI, § 1*; *Tenn. Code Ann. § 23-3-101* (1994); *Tenn. Code Ann. §§ 16-3-503 & 504* (1994); and

Tennessee Supreme Court Rules 7, § 1.01; Rule 8, EC 3-5 and Rule 9, § 20.2(e).

Oral argument on the issues raised was held in this Court. Thereafter, we appointed a Special Master, Chancellor Robert S. Brandt, to develop a factual record and requested that findings of fact and conclusions of law be made with regard to the following issues:

> (1) The specific acts performed by and the circumstances under which appraisers and other [**6] non-attorneys 'act, appear and participate' before the State Board of Equalization and county boards of equalization, including all relevant acts prior and subsequent to such hearings;
>
> (2) The legal and factual issues addressed by such non-attorneys as agents for taxpayers in their appearances before said bodies and otherwise; and
>
> (3) The legal and factual issues raised by the petition and responses thereto in the context of proof presented to the master.

After an evidentiary hearing, the Special Master filed a report with this Court, which found, as a matter of fact, that the "services performed by non-attorney agents on behalf of either taxpayers or taxing authorities does (sic) not constitute the practice of law." The Special Master also found that the specific acts performed by attorneys and non-attorney representatives consisted almost exclusively of providing information about property value, and that legal issues are not addressed by taxpayer agents. As a matter of law, the Special Master concluded that the [*771] General Assembly was acting within its constitutional authority when it adopted *Tenn. Code Ann. § 67-5-1514* (1994). A portion of the Special Master's report [**7] [5] is reproduced below.

5 The full text of the Special Master's report is attached as Appendix II to this opinion.

SPECIAL MASTER'S REPORT

Part III

THE LEGAL AND FACTUAL ISSUES RAISED

A. Section 1514 does not authorize the practice of law by non-attorneys.

The services performed by non-attorneys on behalf of either taxpayers or taxing authorities does not constitute the practice of law. The Code of Professional Responsibility adopted by the Tennessee Supreme Court provides that "the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer." Tennessee Supreme Court Rule 8, EC 3-5.

Appraisal appeals are initiated by filing a fill-in-the-blank form with the local board of equalization (Ex. 1 & 2). The only information placed on the form is the identity of the property. No legal training, skill or judgment is required for identifying the property on the form.

The next step is often a conference with the local taxing authority. The taxing authority [**8] is represented by the appraiser or a deputy. Appeals often end at this stage because the taxing authority may agree that the information presented on behalf of the taxpayer supports the taxpayer's valuation or because the taxing authority and the taxpayer may agree on a compromise assessment. No legal training, skill or judgment is required to participate in these conferences.

If the case does not end with a conference, a hearing is held before the local board of equalization. The hearings are informal. No rules of procedure or evidence are followed. The hearings are essentially non-adversarial, information gathering sessions.

Very few of the members of the local boards are attorneys. There are no opening statements or closing arguments. There is no direct or cross-examination of witnesses. Information is simply given in narrative form. No legal training, skill or judgment is required to participate in the hearings.

The next step is an appeal to the State Board of Equalization. Taxpayers and taxing authorities can appeal, but appeals by taxing authorities are rare. Once an appeal is requested, the case is assigned to an administrative law judge (ALJ). Hearings before the ALJs [sic] [**9] are informal. They do not resemble trials. Information is given in narrative form. Questions may be asked, but not in the form of direct and cross examination. The rules of evidence are not enforced. No legal training, skill, or judgment is required to participate in the ALJ hearings.

A party dissatisfied with an ALJ decision can obtain review by the Assessment Appeals Commission (AAC) of the State Board of Equalization. Requests for review by the AAC are quite informal. The AAC will accept most anything in writing expressing a desire for a review. Fill-in-the-blank forms that contain minimal information about the property are also used (Ex. 9).

Hearings before the AAC are informal. If there is discovery, it usually consists of exchanging papers. Depositions are not taken. Opening statements and closing arguments are not usually made. Most members of the AAC are not attorneys. Much of the information is obtained through questions asked by AAC members. The rules of evidence are not enforced. Information is usually given in narrative form. Questions are asked of people giving information, but it is rarely in the form of direct and cross-examination. No legal training, skill, [or] [**10] judgment is required to assist taxpayers or taxing authorities at hearings before the AAC.

[*772] Final review by the State Board of Equalization is discretionary and is seldom granted.

As noted, most of the handful of attorneys who represent taxpayers are also registered agents who appear in that capacity and give information to the board rather than conduct themselves as attorneys.

Little if any of the work done by the Memphis law firm that assists taxpayers (apparently the only firm in Tennessee that represents taxpayers) can be said to be the type of work regularly performed by attorneys. The work consists of processing a large volume of appeals by identifying property on the fill-in-the-blank forms, then gathering information about the property and presenting it informally to either the assessor or assessor['s] dep-

uty in a conference or to a board in the informal hearings. One member of the firm was asked to identify legal issues in assessment appeals. Though she attempted to do so, she never really identified any.

The governing authority for assessments is not the statutes and cases usually relied upon by courts and cited by attorneys. Rather, it is a manual prepared by the [**11] Division of Property Assessment of the Office of the State Comptroller.

B. The Enactment of § 1514 is within the power conferred on the General Assembly by Article Two, Section 28 of the Tennessee Constitution.

There is no provision in the Tennessee Constitution that specifically grants the Tennessee Supreme Court the authority to regulate the practice of law. Rather, the authority derives from the doctrine of separation of powers expressed in Article Two, Sections 1 & 2 of the Constitution. *Cantor v. Brading, 494 S.W.2d 139, 141 (Tenn. Ct. App. 1973)*. The authority to regulate the practice of law has been described as "inherent power" that results from the Court's position in the judicial branch of government. *Petition of Tennessee Bar Association, 532 S.W.2d 224, 229 (Tenn. 1975)*.

The Constitution, at Article II, Section 28, specifically grants the taxing power to the Legislature. It provides in part that "the value and definition of property in each class or subclass [is] to be ascertained in such manner as the Legislature shall direct." Thus, the same Constitution that implicitly gives the Supreme Court authority to regulate the practice of law explicitly [**12] gives the Legislature the authority to decide the manner in which property value will be ascertained.

This explicit grant of authority is broad enough to authorize the Legislature to permit non-attorneys to assist taxpayers and taxing authorities in assessment appeals. The Supreme Court does not have the authority under the Constitution to regulate any non-judicial phase of the valuation process, including determining the qualifications of the persons or entities who can assist taxpayers and taxing authorities in assessment appeals.

Based upon our review of the record of the hearing before the Special Master, as well as the briefs filed in this Court, we adopt and affirm the Preliminary Findings, Part I, Part II, and Part III A of the Special Master's report. Part III B of the Special Master's report, containing the Master's conclusions of law, is affirmed as modified below.

REGULATION OF THE UNAUTHORIZED PRACTICE OF LAW

The supreme judicial power of this State is "vested in one Supreme Court and in such Circuit, Chancery and other inferior Courts as the Legislature shall from time to time, ordain and establish; in the Judges thereof, and in Justices of the Peace." *Tenn.* [**13] *Const. Art. VI, § 1*. As a result of that broad grant of power, it has long been recognized and widely accepted that the Tennessee Supreme Court is the repository' of the inherent power of the judiciary in this State. See Petition of Tennessee *Bar Ass'n, 532 S.W.2d 224 (Tenn. 1975)*; *Belmont v. Board of Law Examiners, 511 S.W.2d 461, 462 (Tenn. 1974)*; *Cantor v. Brading, 494 S.W.2d 139, 142 (Tenn. App. 1973)*. Indeed, *Tenn. Code Ann. §§ 16-3-503 & 504* (1994), declare that this Court possesses the broad conference of full, plenary, and discretionary inherent power [*773] that existed at common law at the time of the adoption of our Constitution.

Included within this Court's inherent power is the essential and fundamental right to prescribe and administer rules pertaining to the licensing and admission of attorneys Id; see also *Ramsey v. Board of Professional Responsibility of the Tennessee Supreme Court, 771 S.W.2d 116, 118 (Tenn. 1989)*; Petition of Tennessee *Bar Ass'n, 539 S.W.2d 805, 807 (Tenn. 1976)*; Petition for Rule of Court Activating, Integrating and Unifying the State Bar of Tennessee, *199 Tenn. 78, 282 S.W.2d 782 (1955)*. As a result, this Court exercises original [**14] jurisdiction over issues pertaining to the practice of law.

As was explained in Petition for Rule of Court, supra,

If Courts have inherent power to prescribe qualifications required for the practice of law, it seems to follow, as held by the Supreme Court of Massachusetts, in *Collins v. Godfrey, 324 Mass. 574, 87 N.E.2d 838, 841*, that "the Supreme Judicial Court, as under the Constitution the highest court in the Commonwealth, is the

> proper representative of the judicial department and the repository of the power." This Court's power, then, in this respect is original, rather than appellate.

Id. at 83, 282 S.W.2d at 784. Thus, while we have considered and discussed on several previous occasions our inherent authority to regulate the licensing and admission of attorneys, as well as our concomitant original jurisdiction over such matters, it appears that this petition presents an issue of first impression as to whether this Court's inherent power and original jurisdiction include the right to regulate and prevent the unauthorized practice of law.

The vast majority of supreme courts of other jurisdictions considering the issue have concluded that the state judiciary's [**15] inherent power includes the authority and the original jurisdiction to prevent the unauthorized practice of law. For example, the Supreme Court of Arizona held in *Hunt v. Maricopa County Employees Merit Sys. Comm'n, 127 Ariz. 259, 619 P.2d 1036, 1039 (Ariz. 1980)*, that "the great weight of authority is in accord with the proposition that the ultimate authority for defining, regulating and controlling the practice of law is vested in the Judiciary." An early illustrative case is the holding of the West Virginia Supreme Court in *West Virginia State Bar v. Earley, 144 W. Va. 504, 109 S.E.2d 420 (W.Va. 1959)*, that "the judicial department . . . has the inherent power to define, supervise, regulate and control the practice of law and the Legislature can not restrict or impair this power of the courts or permit or authorize laymen to engage in the practice of law." A more recent application of the rule occurred in *The Florida Bar re Advisory Opinion HRS Nonlawyer Counselor, 518 So. 2d 1270 (Fla. 1988)*, where the Florida Supreme Court held that "this Court 'shall have exclusive jurisdiction to regulate the admission of persons to the practice of law,' and the attending power to prevent [**16] the unauthorized practice of law." See also *Unauthorized Practice of Law Comm. of Supreme Court of Colorado v. Employers Unity. Inc., 716 P.2d 460, 463 (Colo. 1986)*; *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998, 1002 (Colo. 1957)*; *Brookens v. Comm. on Unauthorized Practice of Law, 538 A.2d 1120, 1125*, note 13 (D.C. App. 1988); *Florida Bar v. Moses, 380 So. 2d 412, 417 (Fla. 1980)*; *Idaho State Bar Ass'n v. Idaho Public Utilities Comm'n, 102 Idaho 672, 637 P.2d 1168, 1171 (Idaho 1981)*; *Professional Adjusters, Inc. v. Tandon, 433 N.E.2d 779, 783 (Ind. 1982)*; *Reed v. Labor and Indus. Relations Comm'n, 789 S.W.2d 19* (Mo. banc 1990); *State ex rel. Johnson v. Childe, 139 Neb. 91, 295 N.W. 381, 382 (Neb. 1941)*; *Henize v. Giles, 22 Ohio St. 3d 213, 490 N.E.2d 585, 588-89 (Ohio 1986)*; *Unauthorized Practice of Law Comm. v. State, Dept. of Workers' Compensation, 543 A.2d 662, 664 (R.I. 1988)*; In *Re Unauthorized Practice of Law Rules Proposed by South Carolina Bar, 422 S.E.2d 123, 124 (S.C. 1992)*; *State ex rel. Reynolds v. Dinger, 14 Wis. 2d 193, 109 N.W.2d 685, 692 (Wis. 1961)*.

We conclude that as the court of last [**17] resort in this state and as the representative of the judicial branch of government, this Court possesses not only the inherent supervisory power to regulate the practice of law, but also the corollary power to prevent the unauthorized practice of law. That conclusion [*774] is buttressed by our own rules which provide that "no person shall engage in the 'practice of law' or the 'law business' in Tennessee, except pursuant to the authority of this Court . . .," Rule 7, § 1.01, Rules of the Tennessee Supreme Court (emphasis added), as well as the legislative declarations recognizing this Court's broad, full, plenary, and discretionary inherent powers. *Tenn. Code Ann. §§ 16-3-503 & 504* (1994). Essential to and interrelated with that inherent power is the concomitant authority, when circumstances warrant, to exercise original jurisdiction over matters concerning the unauthorized practice of law within this State. See Petition of Tennessee *Bar Ass'n, supra, 539 S.W.2d at 807*; Petition of Tennessee *Bar Ass'n, supra, 532 S.W.2d at 226*; *Belmont v. Board of Law Examiners, supra, 511 S.W.2d at 462*. Indeed, it is by virtue of this Court's inherent authority to regulate the unauthorized [**18] practice of law that we exercised original jurisdiction in the present proceeding.

Although acknowledging this Court's inherent power to regulate the unauthorized practice of law, the Special Master concluded that the power does not extend to any non-judicial phase of the valuation process, including determining the qualifications of the persons or entities who can assist taxpayers and taxing authorities in assessment appeals, because the Constitution specifically grants to the Legislature the taxing power and provides that "the value and definition of property in each class or subclass [is] to be ascertained in such manner as the Legislature shall direct." *Tenn. Const. Art. II, § 28.*

The Master's conclusion is no doubt based on the principle of separation of powers which is fundamental to American constitutional government and is expressed in Article II, Sections 1 and 2 of the Tennessee Constitution as follows:

> Sec. 1. Division of powers. -- The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial.
>
> Sec. 2. Limitation of powers. -- No person or persons belonging to one of

> these departments shall exercise [**19] any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

Despite these explicit constitutional provisions, it is impossible to preserve perfectly the "theoretical lines of demarcation between the executive, legislative and judicial branches of government." *Underwood v. State, 529 S.W.2d 45, 47 (Tenn. 1975)*. Indeed there is, by necessity, a certain amount of overlap because the three branches of government are interdependent. Id. The Special Master, however, interpreted Art. II, Sec. 28 in a manner that would divest this Court of any authority to regulate the unauthorized practice of law before the boards of equalization. This interpretation is too broad. Although the legislative branch is vested with the authority to designate the method by which the value and classification of property is to be ascertained, this Court is the only branch of government that possesses the inherent power to determine whether the method so designated by the legislature permits the unauthorized practice of law. That rule controls despite the fact that the non-attorney agents are participating in administrative proceedings rather than court [**20] proceedings. See *Application of New Jersey Soc. of Certified Pub. Accountants, 102 N.J. 231, 507 A.2d 711, 714 (N.J. 1986)*; *West Virginia State Bar v. Earley, supra, 109 S.E.2d at 432*; *State ex rel. Reynolds v. Dinger, supra, 109 N.W.2d at 690*; *Slimm v. Yates, 236 N.J. Super. 558, 566 A.2d 561, 563 (N.J.Super.Ch. 1989)*.

By so saying, we do not imply that the General Assembly is completely without authority to enact legislation regarding the practice of law. As this Court previously has explained,

> the inherent right of Courts to prescribe qualifications necessary for the practice of law does not mean that the Legislature is without authority in that field. The property, rights, liberties and lives of people are continuously entrusted to lawyers. So, the State is vitally interested in the qualifications and integrity of those into whose hands such vital trusts are continuously placed. Thus, a legislative requirement that individuals who would practice this profession must first meet certain reasonable conditions and qualifications is only [*775] the exercise by the Legislature of the police power with which that department of our government is vested. *Lamb v. Whitaker,* [**21] *171 Tenn. 485, 490, 105 S.W.2d 105.*
>
> But the exercise of such authority by the Legislature does not mean that this Court, in the exercise of its authority within the premises, may not require qualifications more extensive than those exacted by the Legislature.

In Re Petition for Court Rule, supra, 282 S.W.2d at 784 (emphasis added). This general rule is followed in other jurisdictions as well, and was expressed by the Rhode Island Supreme Court in *Unauthorized Practice of Law Comm. v. State, Dept. of Workers' Compensation, supra,* as follows:

> It has long been the law of this state that the definition of the practice of law and the determination concerning who may practice law is exclusively within the province of this court and further, that the Legislature may act in aid of this power but may not grant the right to anyone to practice law save in accordance with standards enunciated by this court.

543 A.2d at 664.

The issue in this case therefore becomes whether the General Assembly, by enacting *Tenn. Code Ann. § 67-5-1514* (1994), sanctioned and permitted the unauthorized practice of law and thereby infringed upon this Court's constitutional role and [**22] inherent authority. Initially, we note that the general rules of statutory construction apply in this case. Accordingly, in reviewing this statute for a possible constitutional infirmity, we are required to indulge every presumption and resolve every doubt in favor of the constitutionality of the statute. *State v. Lyons, 802 S.W.2d 590, 592 (Tenn. 1990)*. That general rule applies with even greater force in this case where the facial constitutional validity of the statute is questioned. *Davis- Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520 (Tenn. 1993)*; *Idaho State Bar Ass'n v. Idaho Pub. Util. Comm'n, supra, 637 P.2d at 1170.*

In analyzing the validity of the statute, we adopt the summary and description of the process contained within the Special Master's report. We agree with the Special Master that Tennessee Supreme Court Rule 8, EC 3-5 is the standard by which to determine whether the services performed by the non-attorney agents constitute the practice of law. That ethical consideration appears in the Code of Professional Responsibility following Canon 3, which directs that "[a] lawyer should assist in preventing

the unauthorized practice of law." The ethical [**23] consideration specifically provides as follows:

> It is neither necessary nor desirable to attempt the formulation of a single specific definition of what constitutes the practice of law. Functionally the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.

Our decision to adopt the general standard contained within Ethical Consideration 3-5, is consistent with the rule observed in other jurisdictions. See, e.g., *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n,* [**24] *supra, 312 P.2d at 1008.*

In adopting the general definition contained within Ethical Consideration 3-5, we note that the term "practice of law" is defined more specifically in Tennessee Supreme Court Rule 9, § 20.2(e). [6] However, that [*776] broad definition is contained within a rule requiring attorneys who practice law to pay an annual disciplinary fee. The rule was not designed nor intended to regulate the unauthorized practice of law. Instead it is a regulation of the persons who have been admitted to practice law. Equally inapplicable in the context of this proceeding is Supreme Court Rule 7, § 1.01, which provides that,

> No person shall engage in the "practice of law" or the "law business" in Tennessee, except pursuant to the authority of this Court, as evidenced by a license issued in accordance with this Rule, or in accordance with the provisions of this Rule governing special or limited practice.

Although, in implementing that rule, this Court incorporated the definitions of "practice of law" and "law business" as written by the General Assembly, [7] "'practice of law' for purposes of admission is necessarily broader than 'practice of law' for purposes of [**25] unauthorized practice." See Tennessee Board of Law Examiners' Statement of Policy Concerning the Meaning of "Practice of Law," Sept. 25, 1984, adopted by this Court, Volume 267 Tennessee Decisions, at p. XXXI. Thus, we do not consider Rule 7, § 1.01 controlling in this proceeding.

6 "The term, "practice of law" shall be defined as any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy, in or out of court, rendered in respect to the rights, duties, regulations, liabilities or business relations of one requiring the services. It shall encompass all public and private positions in which the attorney may be called upon to examine the law or pass upon the legal effect of any act, document or law."

7 *Tenn. Code Ann. § 23-3-101* (1994) defines those terms as follows: "Law business" means the advising or counseling for a valuable consideration of any person, firm, association, or corporation, as to any secular law, or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular right, or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to secure for any person, firm, association or corporation any property or property rights whatsoever; and (2) "Practice of law" means the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies.

[**26] The definitions of "law business" and "practice of law," contained in *Tenn. Code Ann. § 23-3-101* (1994), are also incorporated within *Tenn. Code Ann. § 23-3-103* (1994), which prohibits the unauthorized practice of law and provides, in pertinent part that,

> (a) No person shall engage in the "practice of law" or do "law business," or both, as defined in *§ 23-3-101*, unless such person has been duly licensed therefor, and

> while such person's license therefor is in full force and effect, nor shall any association or corporation engage in the "practice of the law" or do "law business," or both, as defined in *§ 23-3-101.*

Persons or entities violating that prohibition commit a Class A misdemeanor and may be subject to damages for three times the amount of any fee received as a result of the prohibited activities. *Tenn. Code Ann. § 23-3-103(d)* (1994). By these statutes, the General Assembly has provided a penalty for the unauthorized practice of law. We view this as an aid to the inherent power of this Court rather than an infringement upon our constitutional and inherent responsibilities. In determining whether *Tenn. Code Ann. § 67-5-1514* permits the unauthorized practice [**27] of law, we are not bound by the definitions of "practice of law" and "law business" employed in these penalty statutes.

As we have previously stated, it is the duty of this Court to resolve doubts in favor of the constitutionality of statutes. Accordingly, we have determined that the definitions contained within *Tenn. Code Ann. § 23-3-101* (1994), must be read in conjunction with Tennessee Supreme Court Rule 8, EC 3-5. Thus, the acts enumerated in the definitions of "law business" and "practice of law" contained within *Tenn. Code Ann. § 23-3-101* (1994), if performed by a non-attorney constitute the unauthorized practice of law only if the doing of those acts requires "the professional judgment of a lawyer." As recognized in Canon 3, the essence of professional judgment is the lawyer's educated ability to relate the general body and philosophy of law to a specific legal problem of a client. Tennessee Supreme Court Rule 8, EC 3-5.

Our interpretation of these various statutory and rule provisions is in keeping with the purpose of regulation governing the [*777] unauthorized practice of law, which is to "serve the public right to protection against unlearned and unskilled advice in matters [**28] relating to the science of the law." *Application of New Jersey Soc. of Certified Pub. Accountants, supra, 507 A.2d at 714*; see also, *Florida Bar re Advisory Opinion HRS Nonlawyer Counselor, supra, 518 So. 2d at 1272.* Indeed, it is our responsibility to "regulate the practice of law and to restrain such practice by laymen in a common-sense way in order to protect primarily the interest of the public and not to hamper and burden such interest with impractical technical restraints no matter how well supported such restraint may be from the standpoint of pure logic." *Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795, 797 (Minn. 1940)*; *Hunt v. Maricopa County Employees Merit Sys. Comm., supra, 619 P.2d at 1040*; *Henize v. Giles, supra, 490 N.E.2d at 589*; State ex rel. Reynolds v. Dinger, supra, 109 N.W. at 691.

CONCLUSION

Applying the foregoing principles to the facts found by the Special Master, which are overwhelmingly supported by the record in this case, it is clear that no proof was introduced to show that the services performed for taxpayers or taxing authorities before the boards of equalization require the professional judgment of a lawyer. The Special Master [**29] thoroughly and accurately discussed each stage of the proceedings before the local and state boards of equalization in Part III A of the report which has been reproduced in this opinion. We adopt the facts as found by the Special Master and affirm the conclusion that *Tenn. Code Ann. § 67-5-1514* (1994), does not sanction the unauthorized practice of law. Accordingly, we affirm, as modified, the Special Master's conclusion upholding the constitutionality of that statute.

Costs of this appeal are taxed to the petitioners, the Tennessee Attorney General and Reporter and the State Board of Equalization.

RILEY ANDERSON, CHIEF JUSTICE

CONCUR:

Drowota, Reid, and Birch, JJ.

O'Brien, Sp.J.

APPENDIX I

TENNESSEE CODE ANNOTATED § 67-5-1514 Provides as follows:

(a) At, or in connection with, any conference or hearing held pursuant to this part, or pursuant to part 14 of this chapter, taxpayers and assessors of property shall be entitled to the assistance of a qualified agent and of such other persons as they may wish.

> (b) At any conference or hearing held pursuant to this part, or with respect to the filing of appeals pursuant to Sec. 67-5-1412, taxpayers and [**30] assessors of property may appear in person, by qualified agent, or, in the case of taxpayers, by a member of the taxpayer's immediate family. An agent shall not have the power to appear for, or to act on behalf of, a taxpayer unless the agent presents a written authorization from the taxpayer at Or prior to the conference or hearing.
>
> (c) The following persons are permitted to act, appear and participate as an agent for the taxpayer:

(1) Attorneys;

(2) With respect to a corporation or other artificial entity, its regular officers, directors or employees; and

(3) Where the primary issue of any complaint, protest or appeal pertains to those grounds as provided in Sec. 67-5-1407, any person who presents to the board of equalization a statement of qualifications that such person has four (4) years of experience in real property appraisal and/or assessment valuation, and that such person either has successfully completed not less than one hundred twenty (120) classroom hours of academic instruction in subjects related to property appraisal or assessment of property from a college or university, or from a nationally recognized appraisal or assessment organization approved [**31] by the board or, in lieu of such educational requirements, has successfully passed the examination for Tennessee certified assessor as administered by the board. The board may, in its discretion, recognize certain professional designations from appraisal and/or assessment organizations which require qualifications at least [*778] equal to those set forth herein, in which event persons possessing any such designation shall be registered without submission of experience and educational requirements. A corporation engaged in the business of evaluation of property may be registered if its principal officer is registered, but only employees of such corporation who are registered shall be permitted to act as agents for taxpayers. In addition to the foregoing persons, if the only issue of an appeal is proper completion of a schedule listing tangible personal property, and/or establishing the value thereof, a certified public accountant may act, appear and participate as an agent for the taxpayer.

(d) Where the primary issue of any complaint, protest or appeal pertains to those grounds as provided in Sec. 67-5-1407, then all conferences or hearings shall be conducted in an informal manner. [**32]

(e) An assessor of property may delegate duties to be performed under this chapter to any of his deputies.

(f)(1) All persons authorized to appear before the board of equalization pursuant to the provisions of subdivision (c)(3) shall register with the board, and the board may reprimand, revoke, or suspend from practice or place on probation or otherwise discipline any agent for any of the acts set forth below:

(A) Procuring or attempting to procure registration pursuant to this part by knowingly making a false statement, submitting false information, or through any form of fraud;

(B) Failing to meet the minimum qualifications established by this section;

(C) Paying money or other valuable consideration, other than as provided for by this section, to any member or employee of the board to procure registration under this section; or

(D) Any act or omission involving dishonesty or fraud that could substantially benefit the registrant or another person or with the intent to substantially injure another person.

(2) The board may adopt additional standards of conduct, if any, regarding all agents when appearing any any conference or hearing pursuant [**33] to this section.

(3) There is hereby created within the board a regulatory panel, to consist of six (6) members, each of whom shall serve a two-year term, the members to be selected by the board from among a list of individual agents who are registered with the board and who have been nominated to serve on the panel by individual agents

who are registered with the board. The panel may adopt standards of conduct for all agents, which standards then shall be subject to approval by the board. The majority of the panel constitutes a quorum and the affirmative vote of two-thirds (2/3) majority of the panel, or two-thirds (2/3) majority vote of the board upon appeal, is necessary for disciplinary action against any agent.

(4) Upon receipt of a written complaint made against any agent, the executive secretary, if the executive secretary determines that the complaint warrants an investigation, shall notify the agent, and the agent shall file an answer to the complaint with the executive secretary within forty-five (45) days from receipt of notice. Following receipt of the agent's answer to the complaint, the executive secretary shall appoint an administrative judge from the staff [**34] of the board who shall investigate the complaint. The administrative judge may dismiss the complaint or determine that a hearing is required. Any such hearing shall be conducted by the panel, and the panel may discipline any agent in any manner provided in this section. Within forty-five (45) days from the date of the panel's disciplinary decision, the disciplined agent may appeal the panel's decision to the board. In the event of such appeal, the members of the board shall conduct a hearing and may confirm or dismiss the panel's disciplinary decision.

(5) Each agent required to register with the board shall pay an annual registration fee of one hundred dollars ($ 100).

(g) Any written solicitation of business, by letter, advertisement, or otherwise, by any [*779] person other than an attorney, who qualifies as an agent under this section shall contain, in type large enough to be easily readable, a disclaimer substantially as follows: "Taxpayer agents who are not lawyers may only appear on your behalf before the state board of equalization on matters of classification, assessment, and/or valuation, and may not represent you in a court of law."

(h) A person who is acting [**35] as an agent for a taxpayer or for an assessor of property on March 23, 1988, shall have until June 30, 1989, to obtain registration as provided in subsections (a)-(g), and until such date such persons may continue to act as agents.

(i) All other provisions of this section notwithstanding, this section shall not apply in any manner to the representation of a taxpayer by an attorney.

(j) No provision in this section is intended to require that any person must be an attorney, certified public accountant, agent registered with the board, or otherwise in order to act as an agent for a taxpayer before a county board of equalization.

APPENDIX II

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

FILED

MAY 4 1994

Cecil Crowson, Jr.

IN RE: PETITION OF CHARLES W. BURSON, ATTORNEY GENERAL OF TENNESSEE, AND THE STATE BOARD OF EQUALIZATION FOR DETERMINATION OF WHETHER REPRESENTATION OF TAXPAYERS BY REGISTERED APPRAISERS AND OTHER NON-ATTORNEYS (CORPORATE EMPLOYEES AND CPA'S) BEFORE THE STATE AND LOCAL BOARDS OF EQUALIZATION CONSTITUTES THE PRACTICE OF LAW

NO. 01S01-9209-OT-00103

SPECIAL MASTER'S REPORT

The Statute

In 1988, the Tennessee General Assembly enacted chapter 619, [**36] Public Acts of 1988, *T.C.A. § 67-5-1514* (hereafter, § 1514). In it the Legislature specified four classes of people who are authorized to assist taxpayers with appeals to boards of equalization and in conferences with local assessors: (1) a member of the taxpayer's immediate family; [1] (2) attorneys; (3) officers, directors or employees of corporations or any "other artificial entity"; and (4) registered agents. [2]

1 The statute does not define "member of immediate family."

2 The statute does not use the term "registered agent," but the property taxing establishment refers to agents who are registered by that term.

The statute also provides that assessors are permitted to appear in person or through a deputy.

Section 1514 requires that registered agents obtain specified education or pass an examination and that they have at least four years experience in real property appraisals. A registered agent regulatory board is established and given jurisdiction to license and discipline agents.

The Petition

[**37] On September 2, 1992, the Tennessee Attorney General filed a petition with the Tennessee Supreme Court entitled "Petition for Determination of Whether Representation of Taxpayers by Registered Appraisers and Other Non-Attorneys Before the State and Local Boards of Equalization Constitutes the Practice of Law." The Supreme Court determined that the issues raised by the petition could not be resolved solely on legal issues and that "a factual record must be developed."

On July 22, 1993, the Supreme Court appointed the Special Master to hear proof on three issues:

> [*780] (1) The specific acts performed by and the circumstances under which appraisers and other non-attorneys act, appear and participate before the State Board of Equalization and county boards of equalization, including all relevant acts prior and subsequent to such hearings;
>
> (2) The legal and factual issues addressed by such non-attorneys as agents for taxpayers in their appearances before said bodies and otherwise; and
>
> (3) The legal and factual issues raised by the petition and responses thereto in the context of proof presented to the master.

Special Master Proceedings

The case before the Special Master [**38] progressed essentially the same as a trial court case although there were no pleadings. The parties divided into two groups, one that advocated that § 1504 authorizes the practice of law by non-attorneys and is unconstitutional (the Proponents) and the other that advocated that § 1504 does not authorize the practice of law and is not unconstitutional (the Opponents).

The initiative for the Proponents was taken by a Memphis law firm that assists taxpayers in appeals for a fee. The initiative for the Opponents was taken by registered agents and by corporations that use employees to assist in appraisal appeals.

Several interested parties were not represented. No one appeared on behalf of residential taxpayers. No one appeared on behalf of unincorporated business taxpayers. No one appeared on behalf of unincorporated associations. No one appeared on behalf of taxing authorities. The two bar associations that filed appearances in the Supreme court did not participate.

An evidentiary hearing was held in Nashville on April 4-6, 1994. Among the witnesses who testified were attorneys who assist taxpayers, registered agents, the Executive Director of the State Board of Equalization, an [**39] administrative law judge for the Board, a charter member of the Board's Assessment Appeals Commission, assessors or their deputies from Davidson, Hamilton, and Knox Counties, and a representative of the Shelby county Board of Equalization. Fifty eight exhibits were introduced. Excellent briefs were filed.

Preliminary Findings

There are several preliminary findings that are not directly responsive to the Supreme Court's three issues but which are necessary to place the Special Master's report in context.

- Section 1514 did not expand the list of representatives authorized to represent taxpayers or taxing authorities. For the most part, it merely codified the existing practice.

- There is no evidence that anyone is dissatisfied with the practice codified in § 1514.

- Restricting taxpayer and taxing authority assistance to attorneys will substantially alter and disrupt the appeal process and is likely produce the following consequences:

(1) Many individual taxpayers, smaller incorporated businesses, partnerships, and unincorporated associations will be effectively precluded from appealing assessments. The amount of potential tax savings is too small for attorneys charging contingent [**40] fees to assist taxpayers, and taxpayers could not afford to pay attorney fees for assistance now being provided by family members, employees, partners, or association members.

(2) The cost to county governments will be enormous. They will be required to employ large numbers of

attorneys to perform tasks now performed by assessors or their deputies including conferring with taxpayers and making presentations to boards.

(3) Proceedings that are now informal will become more formal, thus increasing the cost to all parties involved.

- There is no credible evidence that attorneys can better represent taxpayers and taxing authorities than the others who are authorized to do so. Indeed, the evidence is to the contrary. Registered agents, employees of businesses, and members of unincorporated associations can better represent taxpayers than can attorneys. Likewise, assessors [*781] or their deputies can better represent taxing authorities than can attorneys.

- Section 1504 requires minimum qualifications for registered agents. Attorneys, on the other hand, are not required to have any particular qualifications.

- Less than ten attorneys in the entire state of Tennessee regularly represent taxpayers [**41] in assessment appeals. Most of those attorneys were previously employed in state government in the assessment process in one capacity or another. They are also registered agents and usually appear in that capacity rather than as attorneys. Apparently, only two or three attorneys in Tennessee act as advocates when representing taxpayers in assessment appeals.

- No attorneys regularly represent the taxing authorities in assessment appeals.

- There is no evidence that any more attorneys are even interested in representing taxpayers or taxing authorities in appraisal appeals.

- There was testimony that every other state except New Jersey permits registered agents and other non-attorneys to assist taxpayers with assessment appeals. The non-lawyer prohibition in New Jersey was enacted by its legislature, not the state courts.

I

SPECIFIC ACTS PERFORMED BY NON-ATTORNEY REPRESENTATIVES

This question is more fully answered in part III (A) of this report.

The evidence offered was insufficient for the Special Master to make any findings regarding the specific acts performed by family members, business owners, and members of unincorporated associations. The evidence was limited to acts performed [**42] by registered agents, corporate employees, and assessors or their deputies.

The specific acts performed by these non-attorney representatives - and attorneys too for that matter - consist almost exclusively of providing information about property value. For commercial property, this is usually information about of income or potential income. For residential property, it is often information about comparable sales.

II

LEGAL AND FACTUAL ISSUES ADDRESSED BY TAXPAYER AGENTS

Legal issues are not addressed by taxpayer agents. Members of a taxpayer's immediate family and officers, directors or employees of a corporation or any "other artificial entity" are permitted to represent taxpayers on the factual issues of classification and value. Registered agents are permitted to represent taxpayers only on the factual issue of value.

In actual practice, in practically every appeal at every level, value is the only issue addressed by any taxpayer agent.

III

THE LEGAL AND FACTUAL ISSUES RAISED

A. Section 1514 does not authorize the practice of law by non-attorneys.

The services performed by non-attorneys on behalf of either taxpayers or taxing authorities does not constitute the practice [**43] of law. The Code of professional Responsibility adopted by the Tennessee Supreme Court provides that "the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer." Tennessee Supreme Court Rule 8, EC 3-5.

Appraisal appeals are initiated by filing a fill-in-the blank form with the local board of equalization (Ex. 1 & 2). The only information placed on the form is the identity of the property. No legal training, skill or judgment is required for identifying the property on the form.

The next step is often a conference with the local taxing authority. The taxing authority is represented by the appraiser or a deputy. Appeals often end at this stage because the taxing authority may agree that the information presented on behalf of the [*782] taxpayer supports the taxpayer's valuation or because the taxing authority and the taxpayer may agree on a compromise assessment. No legal training, skill or judgment is required to participate in these conferences.

If the case does not end with a conference, a hearing is held before the local board of equalization. The hearings are informal. No rules of procedure or evidence are

followed. The hearings [**44] are essentially non-adversarial, information gathering sessions.

Very few of the members of the local boards are attorneys. There are no opening statements or closing arguments. There is no direct or cross-examination of witnesses. Information is simply given in narrative form. No legal training, skill or judgment is required to participate in the hearings.

The next step is an appeal to the State Board of Equalization. Taxpayers and taxing authorities can appeal, but appeals by taxing authorities are rare. Once an appeal is requested, the case is assigned to an administrative law judge (ALJ). Hearings before the ALJ's are informal. They do not resemble trials. Information is given in narrative form. Questions may be asked, but not in the form of direct and cross examination. The rules of evidence are not enforced. No legal training, skill, or judgment is required to participate in the ALJ hearings.

A party dissatisfied with an ALJ decision can obtain review by the Assessment Appeals Commission (AAC) of the State Board of Equalization. Requests for review by the AAC are quite informal. The AAC will accept most anything in writing expressing a desire for a review. Fill-in-the-blank [**45] forms that contain minimal information about the property are also used (Ex. 9).

Hearings before the AAC are informal. If there is discovery, it usually consists of exchanging papers. Depositions are not taken. Opening statements and closing arguments are not usually made. Most members of the AAC are not attorneys. Much of the information is obtained through questions asked by AAC members. The rules of evidence are not enforced. Information is usually given in narrative form. Questions are asked of people giving information, but it is rarely in the form of direct and cross-examination. No legal training, skill, judgment is required to assist taxpayers or taxing authorities at hearings before the AAC.

Final review by the State Board of Equalization is discretionary and is seldom granted.

As noted, most of the handful of attorneys who represent taxpayers are also registered agents who appear in that capacity and give information to the board rather than conduct themselves as attorneys.

Little if any of the work done by the Memphis law firm that assists taxpayers (apparently the only firm in Tennessee that represents taxpayers) can be said to be the type of work regularly performed [**46] by attorneys. The work consists of processing a large volume of appeals by identifying property on the fill-in-the-blank forms, then gathering information about property and presenting it informally to either the assessor or assessor deputy in a conference or to a board in the informal hearings. One member of the firm was asked to identify legal issues in assessment appeals. Though she attempted to do so, she never really identified any.

The governing authority for assessments is not the statutes and cases usually relied upon by courts and cited by attorneys. Rather, it is a manual prepared by the Division of Property Assessment of the Office of the State Comptroller.

B. The Enactment of § 1514 is within the power conferred on the General Assembly by Article Two, Section 28 of the Tennessee constitution.

There is no provision in the Tennessee Constitution that specifically grants the Tennessee Supreme Court the authority to regulate the practice of law. Rather, the authority derives from the doctrine of separation of powers expressed in Article Two, *Sections 1 & 2* of the Constitution. *Cantor v. Brading, 494 S.W.2d 139, 141 (Tenn. Ct. App. 1973).* The authority to regulate [**47] the practice of law has been described as "inherent power" that results from the Court's position in the judicial branch of government. *Petition of Tennessee Bar Association, 532 S.W.2d 224, 229 (Tenn. 1975).*

[*783] The Constitution, at Article II, Section 28, specifically grants the taxing power to the Legislature. It provides in part that "the value and definition of property in each class or subclass [is] to be ascertained in such manner as the Legislature shall direct." Thus, the same Constitution that implicitly gives the Supreme Court authority to regulate the practice of law explicitly gives the Legislature the authority to decide the manner in which property value will be ascertained.

This explicit grant of authority is broad enough to authorize the Legislature to permit non-attorneys to assist taxpayers and taxing authorities in assessment appeals. The Supreme Court does not have the authority under the Constitution to regulate any non-judicial phase of the valuation process, including determining the qualifications of the persons or entities who can assist taxpayers and taxing authorities in assessment appeals.

Respectfully Submitted,

ROBERT S. BRANDT

Judge, Chancery [**48] Court

Special Master

May 2, 1994

LEXSEE 511 S.W.2D 461

David BELMONT, Petitioner, v. BOARD OF LAW EXAMINERS, Respondent

[NO NUMBER IN ORIGINAL]

Supreme Court of Tennessee

511 S.W.2d 461; *1974 Tenn. LEXIS 494*

June 3, 1974

COUNSEL: [**1] A. J. Archibald, II, Petway, Archibald, Blackshear, Hagwood & Thompson, Nashville, for petitioner.

David M. Pack, Atty.Gen., Everett H. Falk, Asst.Atty.Gen., Nashville, for respondent.

JUDGES: W. M. Leech wrote the opinion. Dyer, C.J., and Chattin, McCanless and Fones, JJ., concur.

OPINION BY: LEECH

OPINION

[*462] Petitioner, David Belmont, has taken the Tennessee Bar Examination four times, and on each occasion has failed to pass the examination. His application for permission to take the examination for the fifth time was denied by the Board of Law Examiners in accordance with Rule 37, Section 7 of the Rules of the Tennessee Supreme Court. Thereupon, Belmont filed a petition for the writ of certiorari with this Court contending that the Board's action was violative of T.C.A. § 4-1902. We granted the writ of certiorari to determine the constitutionality of the foregoing Code section.

Prior to discussing the constitutional question herein involved, we must make it clear that the petition to review the action of the Board of Law Examiners in denying petitioner's request to take the examination for the fifth time is properly before this Court. We reach the foregoing conclusion because [**2] this Court has the inherent power to prescribe and administer rules pertaining to the licensing and admission of attorneys and as a necessary corollary thereto, no other court in Tennessee can construe or determine the applicability of a rule used to implement that power. It results, therefore, if this Court has the inherent and original power to prescribe the rules, then this Court has the original power to review the action of the Board of Law Examiners in interpreting and applying them. *See* In re: Adoption of Rule of Court, *479 S.W.2d 225 (Tenn. 1972)*; Petition for Rule of Court Activating, Integrating and Unifying the State Bar of Tennessee, *199 Tenn. 78, 282 S.W.2d 782, 784 (1954)*.

Having disposed of the jurisdictional question, there remain two questions of law, so closely related that a discussion of one necessarily includes the other. The two questions are as follows:

1. Whether T.C.A. § 4-1902, as amended by Chapter 789 of the Public Acts of 1972, renders null and void Rule 37, Section 7 of the Rules of the Tennessee Supreme Court.

2. Whether an enactment of the Legislature which purports to delete a requirement established by a rule of the Supreme Court with [**3] respect to the admission of persons to practice law constitutes an invalid encroachment on the inherent power of the Supreme Court.

In order to properly discuss the foregoing questions, we will first point out the conflict between the legislation in question and this Court's authority. First, Rule 37, Section 7, provides that an applicant can take the examination required by the Board of Law Examiners three times. If the applicant fails the examination three times, he can take it a fourth time, but only with special permission of the Board and upon such terms as the Board may prescribe. The rule then provides: "If he should fail the fourth examination, he will not be permitted to take another."

In 1971, the General Assembly enacted Chapter 354, Public Acts, which was subsequently codified as T.C.A. § 4-1902, as follows:

> "No board, commission, or agency of this state which issues licenses to persons to engage in an occupation, trade, or profession based upon written or oral examination shall adopt or enforce any rule, regulation, or law limiting the number of

EXHIBIT
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> times that any person, otherwise qualified, may apply for and stand such written or oral examination at any regular [**4] examination session regardless of the [*463] number of times such person has taken such examination."

The 1972 General Assembly amended T.C.A. § 4-1902 by passing Chapter 789, Public Acts, which added to said section the following:

> "The provisions of this section shall specifically apply to the state board of law examiners."

This latter amendment clearly conflicts with Rule 37.

In order to resolve the foregoing conflict, a short statement of the history establishing a separate and independent judicial department and the admission of attorneys to practice before the courts in Tennessee will be helpful. A casual look at the Constitution of 1796 reveals that it did not establish a separate judicial department and until 1834, the courts were subservient to the will of the legislature. We note in Caldwell's Constitutional History of Tennessee that: "The power of the legislature to make and unmake courts was properly exercised in 1809, when the Superior Court was abolished and the Supreme Court and the Circuit Courts created." However, this defect in constitutional government was corrected by the Constitution of 1834, and further strengthened by the Constitution [**5] of 1870. The foregoing is evidenced by Article II, Sections 1 and 2 of the Constitution of 1870, which reads as follows:

> "Sec. 1. *Division of powers.* -- The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial.
>
> "Sec. 2. *Limitation of powers.* -- No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted."

Thus, as stated in *Cantor v. Brading, 494 S.W.2d 139 (Tenn.App. 1973)*:

> "If the matter of admission of an attorney to the bar is an exercise of a judicial power, that power lies with the Supreme Court and constitutionally cannot be interfered with by the legislative department of the tripartite government of this State. Conversely, if the power is in the legislative department, the judicial department may not encroach upon the prerogative of the Legislature."

Herein, the petitioner concedes that the Courts have the inherent right to determine who shall practice before them, however, petitioner insists that the 1972 Act does not "encroach upon this sacred ground." [**6] In support of said contention a number of cases have been cited from other jurisdictions, however, it is not necessary to refer to those cases as our own Constitution, statutes, and cases provide ample authority for disposition of this matter.

In *Cantor v. Brading, 494 S.W.2d 139, 142 (Tenn.App. 1973)*, the Court correctly stated that:

> "[The] supreme judicial and judicial supervisory power is an inherent power of the Supreme Court and has been so recognized by the legislative branch of our government. Section 16-331 T.C.A. recognizes that the Supreme Court has the power to take *all* action as may be necessary to the orderly administration of justice within the State, whether or not enumerated in that code section or elsewhere. Section 16-332 T.C.A. declares that this power is of common law origin as it existed at the time of the adoption of our Constitution."

Thus, when the General Assembly enacted T.C.A. § 29-101, which established the Board of Law Examiners, they were merely creating an aid to the judiciary, therefore, the Board became a part of the judicial branch of government. This latter fact is further substantiated by the fact that the Supreme Court appoints [**7] the Board's members and has general supervisory authority over all the Board's actions. Similarly, T.C.A. § 29-103 requires the Board to hold examinations for applicants for licenses to practice law and specifically provides that the Supreme Court "shall prescribe rules to regulate the admission of [*464] persons to practice law and providing for a uniform system of examinations . . ." It is important to note, however, that T.C.A. § 29-103 is merely a codification of this Court's inherent constitutional authority to regulate the courts.

Turning now to the Acts of 1971 and 1972, it is evident that they were meant to pertain to examinations given by boards, commissions and agencies which issue licenses to persons engaged in occupations, trades or professions. These boards, commissions and agencies are arms of the legislative branch of the government to which the legislature has delegated authority to issue licenses which otherwise would have to be done by the legislature. The Board of Law Examiners, however, is an agency of this Court and it performs certain duties prescribed by the rules of this Court. Moreover, it is important to note that the Board of Law Examiners does [**8] not issue licenses to practice law in the State of Tennessee; that authority remains exclusively with this Court.

The law is clear, therefore, that an act of the legislature in aid of the inherent power of the judiciary is constitutional; but one that conflicts with and supersedes the Court's declared requirements, and constitutes an attempted exercise of powers properly belonging to the judicial branch by the legislative branch of government violates Article II, Section 2 and *Article VI, Section 1 of the Constitution of Tennessee. Cantor v. Brading, supra*; Schoolfield v. Tennessee Bar Association, (Tenn. 1974). In the instant case, it is evident that the 1972 amendment to T.C.A. § 4-1902 is in direct conflict with Section 7 of Rule 37 of this Court and thus is unconstitutional. Being unconstitutional, the Board of Law Examiners' decision was proper. Thus, it follows that petitioner will not be allowed to take the Tennessee Bar Examination a fifth time and his petition is [**9] accordingly dismissed.

DYER, C.J., and CHATTIN, McCANLESS and FONES, JJ., concur.

STATE OF TENNESSEE

Office of the Attorney General

ROBERT E. COOPER, JR.
ATTORNEY GENERAL AND REPORTER

LUCY HONEY HAYNES
CHIEF DEPUTY ATTORNEY GENERAL

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May 14, 2008

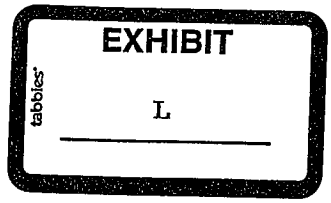
Honorable Geoffrey P. Emery
Presiding Judge
Sessions Court-Division Two
City-County Bldg. 400
Main St. M-70
P.O. Box 2404
Knoxville, TN 37901-2404

Re: Petition of Knox County Public Defender

Dear Judge Emery:

I write on behalf of my client, the Administrative Office of the Courts (AOC), in regard to a petition filed by the Knox County Public Defender requesting that the General Sessions Court suspend appointments of the Public Defender to cases in Knox County General Sessions Misdemeanor Court. The Public Defender has graciously served this Office a copy of the petition.

As you know, AOC has a deep financial interest in this matter because AOC will be charged for indigent criminal defendants' representation in the Public Defender's absence. Given AOC's potential liability, I hope you will transmit to the General Sessions Courts of Knox County my client's respectful request to receive notice and an opportunity to be heard at any hearing of the Public Defender's petition. The potential injury to AOC requires AOC participation, whether as party, intervenor, amicus, or in some other capacity, as a matter of fundamental fairness. I look forward to presenting AOC's position on the Public Defender's petition.



Thank you for your consideration of this request, and I look forward to receiving the Court's response at your earliest convenience.

Sincerely,

DOUGLAS EARL DIMOND
Senior Counsel

DED:dw
cc: Mark E. Stephens
T. Maxfield Bahner
Hugh J. Moore, Jr.
D. Aaron Love
Libby Sykes

EXECUTIVE SECRETARY
Supreme Court
State of Tennessee
Nashville 37219

CLETUS W. McWILLIAMS
EXECUTIVE SECRETARY

MEMORANDUM

TO: General Sessions Judges

FROM: Lyle Reid, Chief Justice
Cletus W. McWilliams, Executive Secretary

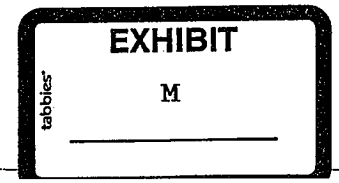
DATE: August 7, 1991

RE: APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS

In order to enact mandated cost reductions in the budget of the state judicial court system, we recently forwarded a memorandum to the state trial judges reminding them of the provisions of Tennessee Code Annotated § 8-14-205 (d-e) regarding the appointment of public defenders to represent indigent defendants in criminal prosecutions whenever possible. The appointment memorandum addressed the situation where there are multiple indigent defendants jointly charged and private counsel, without inquiry to possible conflicts, is automatically appointed to represent one or more of these defendants.

Because counsel for indigent defendants is often appointed initially at the General Sessions court level, we are also enclosing a copy of the pertinent code section for your review. As you are aware, if the court determines a person is indigent in such cases and the person does not waive the right to counsel, the court shall appoint the district public defender or such other appointed counsel as provided by law to represent the person. In 1990 an amendment was enacted by the legislature, adding the second and third sentences in subsection (e) and permitting joint representation by the public defender where there were multiple indigent defendants. The second sentence as set forth below provides:

> Such other indigent persons may also be represented by the district public defender's office; provided, that the court makes an affirmative finding prior to the appointment that no conflict of interest exists and it appears there is good cause to believe no conflict of interest is likely to arise.



Therefore, in light of the 1990 amendment to subsection (e) of the code section, multiple defendants may also be represented by the public defender's office whenever joint representation is consistent with the law, the rules, and ethical considerations. When joint representation is an issue, judges should satisfy themselves that such representation by the public defender's office is appropriate, and when not satisfied, appoint private counsel.

A formal hearing on the issue of possible conflicts in representing joint defendants is not mandated. Each judge should use his or her own discretion in resolving such issues and may rely upon the statements of counsel or such other information as may be available. When the judge has made an inquiry and determined that private counsel is required, an order of the court setting forth the appointment of private counsel and the reason therefor is sufficient. The order should be attached to the attorney's claim for reimbursement and submitted to the Office of the Executive Secretary.

Heavy work load of the public defender's office alone is not an acceptable reason to appoint private counsel. However, if the immediate or continuing responsibilities of that office prevent the public defender from rendering effective assistance of counsel or otherwise performing the duties of that office, it can be considered a reason for appointment of private counsel in cases involving multiple defendants.

The law regarding joint representation has not been changed and no indigent defendant shall be denied adequate representation. Furthermore, there is no suggestion that a lawyer or judge compromise his or her ethical duty. Our intent is only to make judges aware that private counsel need not be appointed as a matter of course in all cases where there are multiple defendants. We are advised that such has been the practice in some judicial districts.

If you have any questions regarding such procedures, please contact Mr. Cletus W. McWilliams at 615/741-2687 or Ms. Suzanne Keith at 615/741-4416.

LR:CWM:GRD:SGK

-1st MEMO-

EXECUTIVE SECRETARY
Supreme Court
State of Tennessee
Nashville 37219

CLETUS W. MCWILLIAMS
EXECUTIVE SECRETARY

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MEMORANDUM

TO: State Trial Judges Exercising Criminal Jurisdiction

FROM: Lyle Reid, Chief Justice
Cletus W. McWilliams, Executive Secretary

DATE: July 12, 1991

RE: APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS

Public defenders should be appointed to represent indigent defendants whenever possible. Private counsel should not be appointed unless there is a conflict wherein the appointment of a private attorney is required.

We are including a copy of Tennessee Code Annotated §8-14-205(d-e) for your review regarding the appointment of counsel to represent indigent persons in criminal cases or in other proceedings involving the possible deprivation of liberty.

As you are aware, if the court determines a person is indigent in such cases and the person does not waive the right to counsel, the court shall appoint the district public defender or such other appointed counsel as provided by law to represent the person. Subsection (e) of the above cited statute further provides that in cases or proceedings where there is more than one indigent defendant, one shall be represented by the district public defender's office and the court shall appoint an attorney to represent the other co-defendants. Please be aware that co-defendants in such cases may be represented by the public defender's office provided the court determines there is no conflict of interest existing or if it appears there is good cause to believe no conflict is likely to arise.

In those cases ~~in which there are~~ two or more defendants and the ~~contention is~~ made that a conflict exists between the parties to the extent that separate counsel is required, rather than accept this contention at face value, the court should make a sufficient inquiry into the matter in order to fully satisfy the court as to the validity of the alleged conflict. A hearing on the matter should be conducted, if necessary.

Where it is necessary to appoint a private attorney due to a conflict, the request for reimbursement of compensation should be accompanied by an order setting forth the explanation as to the necessity of appointment of private counsel rather than the district public defender office.

While we recognize in some areas the office of the district public defender may be somewhat under staffed, this is not an acceptable reason for failure to assign cases to such office.

LR:CWM:SGK

Attachment

- 2ND MEMO -

Supreme Court
State of Tennessee
Nashville 37243-0619

CHIEF JUSTICE
LYLE REID

JUSTICES
FRANK F. DROWOTA, III
CHARLES H. O'BRIEN
MARTHA CRAIG DAUGHTREY
E. RILEY ANDERSON

MEMORANDUM

EXHIBIT
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TO: Judges Exercising Criminal Jurisdiction

FROM: Lyle Reid, Chief Justice

DATE: July 25, 1991

RE: APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS

It has come to my attention that the memorandum of July 12th from this office and the executive secretary regarding appointment of counsel for indigent defendants is subject to misunderstanding. The earlier memo was issued in conjunction with our memo regarding budget reduction efforts of the judiciary. The appointment memorandum addressed the situation where private counsel, without inquiry as to possible conflicts, is automatically appointed to represent one or more defendants jointly charged.

Our intent was to remind judges, in light of the 1990 amendment to T.C.A. 58-14-205 (e), that multiple defendants may also be represented by the public defender's office whenever joint representation is consistent with the law, the rules, and ethical considerations. When joint representation is an issue, trial judges should satisfy themselves that such representation by the public defender's office is appropriate and, when not satisfied, appoint private counsel.

Heavy work load of the public defender's office alone is not an acceptable reason to appoint private counsel. However, if the immediate or continuing responsibilities of that office prevent the public defender from rendering effective assistance of counsel or otherwise performing the duties of that office, it can be considered a reason for appointment of private counsel in cases involving multiple defendants.

Reference in our earlier memo as to the necessity of a hearing was not intended to mandate any specific procedure. It was only intended to reflect the law as amended in 1990, adding the second and third sentences in subsection (e) as set forth below:

Such other indigent persons may also be represented by the district public defender's office; provided, that the court makes an affirmative finding prior to the appointment that no conflict of interest exists and it appears there is good cause to believe no conflict of interest is likely to arise. The original of the order shall be filed with the papers of the cause, and if the court is one of record, the order shall also be entered upon its official minutes.

A formal hearing on the issue of possible conflict in representing joint defendants is not mandated. Each trial judge should use his or her own discretion in resolving such issues and may rely upon the statements of counsel or such other informatic as may be available. When the judge has made an inquiry and determined that private counsel is required, an order of the court setting forth the appointment of private counsel and the reason therefor is sufficient.

The law regarding joint representation has not been changed and no indigent defendant shall be denied adequate representation. Furthermore, there is no suggestion that a lawyer or judge compromise his or her ethical duty. Our intent is only to make judges aware that private counsel need not be appointed as a matter of course in all cases where there are multiple defendants. I am advised that such has been the practice in some judicial districts.

If you have any questions regarding such procedures, please contact Mr. McWilliams, 741-2687, or Ms. Suzanne Keith, at 741-4416.

LR:GRD:SGK

Supreme Court
State of Tennessee
Nashville 37219

CLETUS W. WILLIAMS
EXECUTIVE SECRETARY

November 20, 1991

Judge Bob McGee
Knox County General Sessions Court
Division III
City-County Building
400 Main Street
Knoxville, TN 37902

Re: The Matter of Continued Indigent Representation by the District Public Defender's Office in Knox County General Sessions Court

Dear Judge McGee:

I acknowledge receipt of your letter of November 12, 1991, wherein you enclose a copy of a motion of the District Attorney Defender, Mark Stevens, which has been filed in your court and which has been set for hearing before the four (4) general sessions judges of Knox County on Friday, November 22, 1991, at 9:30 a.m. You state that the gist of the motion is that Mr. Stevens' office is so overwhelmed with cases that he cannot adequately represent new clients. You have offered the opportunity to either myself or any duly appointed representative of the Supreme Court to attend and participate in that hearing and have solicited any advice which we may offer as to how to properly resolve this matter.

The decision with regard to the appointment of counsel for indigent defendants in criminal cases is essentially and ultimately a judicial decision which addresses the discretion of the trial judge. Since the appointment of counsel for indigent defendants involves State revenue

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administered by this office, we have deemed it appropriate to remind the trial courts regarding certain administrative practices. The memoranda of July 12, 1991, and July 25, 1991, sent to all trial judges exercising criminal jurisdiction address the appointment of counsel where there are two or more joint defendants. These memos were prompted by the practice in some counties where separate counsel were being appointed automatically without inquiry with regard to the possibility of a conflict of interest. In those memos the attention of trial judges was called to the 1990 amendments to T.C.A. § 8-14-205 regarding this matter. We emphasized that neither the law nor the practice with regard to judicial ethics, conflict of interest, or the representation of indigent defendants had been changed.

Those memos addressed primarily the representation of multiple defendants rather than the conditions described in your letter. However, the memo of July 25, 1991, states:

> Heavy work load of the public defender's office alone is not an acceptable reason to appoint private counsel. However, if the immediate or continuing responsibilities of that office prevent the public defender from rendering effective assistance of counsel or otherwise performing the duties of that office, it can be considered a reason for appointment of private counsel in cases involving multiple defendants.

As previously stated, the need for the appointment of counsel and the selection of counsel is essentially a judicial function about which this office cannot specifically advise you. However, the communications from us recognize, implicitly and explicitly, that when the public defender is not available to be appointed a private attorney should be appointed, and, most importantly, ALL OTHER CONSIDERATIONS MUST BE SUBORDINATED TO THE RIGHT OF AN ACCUSED TO HAVE EFFECTIVE ASSISTANCE OF COUNSEL AS REQUIRED BY LAW.

Please be advised that since the issue pending before your court is primarily a judicial matter, neither myself nor any representation of the Supreme Court will attend or participate in the hearing, though we do appreciate the courtesy of your invitation.

With kindest regards, I remain

Very sincerely yours,

Clifton W. McWilliams
Executive Secretary to the
Tennessee Supreme Court

CWMcW:LR:jw